(9)

No. 93-1340-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Gary Mezzanatto

Docketed:
February 22, 1994

Court: United States Court of Appeals for the Ninth Circuit

See also:
93-7218

Counsel for petitioner: Solicitor General

Counsel for respondent: Lippman,Mark

1-28-94 ext til 3-8-94, J. O'Connor, CITED.

Entry	Date	Note	Proceedings and Orders
1	Jan 28 1994	G	Application (A93-619) to extend the time to file a petition for a writ of certiorari from February 7, 1994 to March 9, 1994, submitted to Justice O'Connor.
2	Jan 28 1994		Application (A93-619) granted by Justice O'Connor extending the time to file until March 9, 1994.
3	Feb 22 1994	G	Petition for writ of certiorari filed.
4	Mar 22 1994		Brief of respondent Gary Mezzanatto in opposition filed.
6	Mar 29 1994		Reply brief of petitioner filed.
5	Mar 30 1994		DISTRIBUTED. April 15, 1994 (Page 16)
7	Apr 18 1994		Petition GRANTED.
			**********
8	Apr 21 1994	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
9	Apr 21 1994	G	Motion of respondent for appointment of counsel filed.
10	Apr 25 1994		DISTRIBUTED. April 29, 1994 (Page 15)
11	May 2 1994		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
12	May 2 1994		Motion for appointment of counsel GRANTED and it is ordered that Mark R. Lippman, Esquire, of La Jolla, California, is appointed to serve as counsel for the respondent in this case.
13	May 26 1994		Brief of petitioner United States filed.
14	May 26 1994		Joint appendix filed.
16	Jun 8 1994		Order extending time to file brief of respondent on the merits until July 6, 1994.
17	Jul 1 1994	G	Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae filed.
18	Jul 6 1994		Brief of respondent Gary Mezzanatto filed.
19	Aug 2 1994		Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae GRANTED.
20	Aug 9 1994		CIRCULATED.
21	Aug 12 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
22	Aug 15 1994	X	Reply brief of petitioner filed.
24	Aug 17 1994		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 2, 1994.(2ND CASE).
23	Aug 18 1994		Record filed.
		*	Original record proceedings United States District Court

No. 93-1340-CFY

Entry	Date	Note	Proceedings and Orders
25	Nov 2 1994		for the Southern District of California (BOX) ARGUED.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General

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Assistant Attorney General

WILLIAM C. BRYSON
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QUESTION PRESENTED

Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide that statements made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty normally may not be admitted against the defendant who made the statements. The question presented in this case is whether the government may use such statements to impeach the defendant's contrary testimony at trial, when the defendant and his counsel expressly agreed before those statements were made that the government would have the right to use the statements in that manner.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 998 F.2d 1452.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1993. The court of appeals denied a timely petition for rehearing on November 9, 1993. App., *infra*, 20a. On January 28, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rules 102 and 410, Fed. R. Evid.; and Rules 2 and 11(e)(6), Fed. R. Crim. P., are reproduced in the appendix to the petition.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted of possessing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 170 months' imprisonment, to be followed by 60 months' supervised release. The court of appeals reversed. App., *infra*, 1a-19a.

1. On the morning of August 1, 1991, San Diego Narcotics Task Force (SDNTF) agents arrested Gordon Shuster during the execution of a search warrant at a Rainbow, California, residence where Shuster operated a clandestine laboratory for manufacturing methamphetamine. Shuster agreed to cooperate with the SDNTF agents in apprehending others involved in the methamphetamine trade. Tr. 101-106, 152-156.

That afternoon, Shuster placed a call to respondent's pager. When respondent returned Shuster's call, Shuster said that one of his friends (in reality, an undercover officer) wished to purchase a pound of methamphetamine for $13,000, and that the friend would "front" additional money toward the purchase of a second pound of methamphetamine to be delivered later. Shuster made arrangements to meet respondent later that day, and the two met at a local restaurant that evening. Tr. 108-109, 113-114, 121-129.

In the course of the meeting, Shuster introduced the undercover officer to respondent. The officer

asked respondent if "he had brought the stuff with him," to which respondent replied that it was in his car. Respondent and the officer then went to the car, where respondent pointed to a brown paper package. The officer inspected the package, which contained approximately one pound of methamphetamine, and asked how long it would take to produce the second pound. Respondent replied that it would take about six hours. Respondent then took out a glass pipe (later found to contain methamphetamine residue), pointed to the package, and asked the officer if he wanted to take a "hit"—*i.e.*, smoke some of the methamphetamine. The officer replied that he would first get the money. The officer then left the car and gave a pre-arranged arrest signal. Respondent was arrested. Tr. 130-138, 228-229.

2. On October 17, 1991, respondent and his attorney requested a meeting with the Assistant United States Attorney (AUSA) prosecuting the case to discuss respondent's participation in the offense, with a view to offering his cooperation to the government. The AUSA agreed to meet with respondent and his attorney, and the meeting took place on the same day. Two SDNTF agents who were familiar with the investigation were also present. Tr. 359, 365-367.

The AUSA began the meeting by emphasizing that respondent was under no obligation to talk, but that if respondent wanted to cooperate with the authorities he would have to be completely truthful. The AUSA advised respondent that statements he made during that proffer session would not be used as evidence in the government's case-in-chief if respondent proceeded to trial, but that the government's willingness to entertain respondent's proffer was conditioned on

his agreement to allow the government to use his statements in other ways. The government would be permitted to use those statements in a subsequent perjury or false statements prosecution, and to impeach respondent's testimony if he went to trial and gave testimony that differed from the statements he made at the meeting. After the AUSA gave respondent an opportunity to discuss the government's terms with his attorney, respondent and his attorney agreed to them. Tr. 323-324, 358, 366-367, 369-370.

Respondent then stated that he had dealt only in ounce quantities of methamphetamine prior to his arrest, but that he knew that the package he attempted to sell to the undercover officer contained methamphetamine. Respondent initially claimed that he was merely acting as a broker for Shuster, and that he had not known that Shuster was manufacturing methamphetamine on the Rainbow property. Later in the meeting, however, he admitted that he had known that Shuster was engaged in the manufacture of methamphetamine, and that he had helped Shuster move glassware used in that process. Respondent then sought to minimize his involvement in the operation by claiming that he had not visited the Rainbow property for at least a week before his arrest. The SDNTF agents confronted respondent with surveillance evidence that showed that his car was on that property the day before the arrest—and that respondent's claim was a lie. Citing respondent's failure to provide completely truthful information, the AUSA terminated the meeting. Tr. 181, 367-369.

3. Respondent took the stand in his defense at trial. He gave an elaborate account of his relationship

with Shuster, in which he claimed that he had helped Shuster with various projects in the belief that Shuster worked for the Central Intelligence Agency (CIA). Respondent purportedly believed that Shuster was using the Rainbow property to manufacture plastic explosives for the CIA. Respondent also claimed that he obtained a pager at Shuster's request, to allow Shuster to contact him when Shuster had projects for him, and that Shuster had instructed him to list the pager under a fictitious name to prevent anyone from tracing respondent's connection to Shuster. Tr. 265-267, 276-280, 303, 305-307.

Respondent testified that he was not involved in methamphetamine trafficking, and that he did not know that the package he delivered to Shuster contained methamphetamine. Instead, respondent claimed that he received the package from Shuster the day before his arrest, that Shuster expressed concern at that time that the neighbors were becoming "nosey" about his explosive-making activities, and that respondent had accordingly surmised that the package contained plastic explosives. Respondent also testified that Shuster paged him repeatedly on the day of his arrest to arrange for the delivery of the package, and that respondent agreed to deliver it in exchange for $1,300. He explained his conversation with the undercover agent by stating that he was just "playing along" and that it was "Gordon's [Shuster's] deal." Tr. 275-278, 282-288, 312-315, 334-335.

On cross-examination, the prosecutor questioned respondent over objection about his inconsistent statements at the October 17, 1991, meeting and about his failure to advert to Shuster's purported CIA connections at that time. Respondent denied having

stated that he knew the package contained methamphetamine, or that he had trafficked in ounce quantities of methamphetamine. Tr. 290-295, 318-322, 327, 351-352. The government then called one of the agents who was present at the meeting. The agent recounted respondent's prior inconsistent statements. Tr. 365-371. The jury found respondent guilty.

4. A divided panel of the court of appeals reversed. The court began by noting that Rule 410, Fed. R. Evid., and Rule 11(e)(6), Fed. R. Crim. P., are both "quite clear" that a statement made in the course of plea discussions with the attorney for the government is "not * * * admissible against the defendant" except (i) when another statement made in the same discussions has been introduced and the statement in fairness should be considered with it, and (ii) in certain prosecutions for perjury or false statement. Citing *United States* v. *Lawson*, 683 F.2d 688 (2d Cir. 1982), the court concluded that the language rendering such plea discussions "not admissible," read in light of its legislative history, bars the use of such statements to impeach the defendant. Because neither of the exceptions to the rules applied, the court held that the rules barred the admission of the statements made by respondent during the October 17, 1991, proffer session. App., *infra*, 4a-5a.

The court next concluded that a defendant may not waive the protections of Rules 410 and 11(e)(6), even when he agrees to do so with the advice of counsel. In the court's view, "candid and effective plea bargaining could be severely injured" if the rules were subject to waiver, because such waivers "could easily have a chilling effect on the entire plea bargaining process."

App., *infra*, 7a. The court rejected the government's submission that a defendant may waive his rights under the rules just as he may waive constitutional rights, explaining that judicially created waivers of constitutional rights are "an inescapable feature of courts interpreting the Constitution by defining the right being asserted." *Id.* at 9a. By contrast, "[t]o write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress * * * is not an inescapable duty. It more resembles unwelcome advice." *Ibid.* Finally, the court stated that "the government should not be given the ability to extract a waiver of [the] rules from a defendant who is in a weak bargaining position," because "[w]ith such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy." *Ibid.*

Chief Judge Wallace dissented. He noted that criminal defendants may waive the most fundamental rights afforded them by the Constitution, and that it is therefore anomalous to create "a per se rule which invalidates any and all waivers of the protections afforded * * * by" Rules 410 and 11(e)(6). App., *infra*, 12a. Judge Wallace also disagreed with the majority's contention that permitting the government to obtain a waiver would undermine the policy underlying the Rules. He noted that the only "rights" a defendant waives are the "right" to lie in plea negotiations and the "right" to engage in plea bargaining, neither of which is truly a "right." App., *infra*, 14a-15a.

Judge Wallace also found speculative the majority's concern that waivers may reduce plea bargaining, and he rejected the majority's assumption that its rule against waiver was needed to avoid abuses by the

government. He noted that in *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), this Court emphasized its unwillingness to assume that prosecutors will engage in wrongdoing, and the Court upheld an agreement in which an arrestee waived his right to pursue a civil rights action in exchange for dismissal of all criminal charges against him. He explained that, unlike the defendant in *Town of Newton*, who "gave up a potentially legitimate civil rights suit," respondent merely "gave up his ability to provide inconsistent testimony." App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

The court of appeals concluded that a defendant and his attorney may not agree with the government to waive the rules that make evidence obtained during plea discussions inadmissible, so that the defendant's statements can be used to challenge his inconsistent trial testimony. That conclusion conflicts with a recent decision of the Seventh Circuit, and it calls into question procedures routinely used by federal prosecutors throughout the country. Because this case presents an issue of substantial importance to the federal criminal justice system, it calls for review by this Court.

1. The decision of the court of appeals conflicts with *United States* v. *Dortch*, 5 F.3d 1056 (7th Cir. 1993), petition for cert. pending *sub nom. Suess* v. *United States*, No. 93-7218 (filed Dec. 20, 1993). Suess, one of the defendants in that case, entered into a pretrial agreement with the government in connection with his proffer of cooperation. Like respondent, Suess agreed to let the government use his statements to rebut any contrary evidence that he might

introduce at trial. After Suess called a witness who contradicted the statements he had made during the proffer, the government exercised that right without objection. 5 F.3d at 1067. "Leaving aside the issue of whether Suess adequately preserved his objection at trial," the Seventh Circuit concluded that Suess's waiver barred his claims under Rules 410 and 11(e)(6). 5 F.3d at 1067-1068.

Like the court of appeals in this case, the Seventh Circuit concluded that the statements would not be admissible under the rules absent a waiver. 5 F.3d at 1068. But the Seventh Circuit took a different view of the policy implications of such a waiver. The court noted that there is nothing inherently suspect about a waiver of the rights conferred by Rules 410 and 11(e)(6), since even constitutional rights can be waived. Moreover, the court concluded that a waiver does not jeopardize plea negotiations, because the defendant knows where he stands at all times: in advance of his proffer to the government, he knows that if he later makes inconsistent statements at trial, his earlier statements can be used against him. That fact simply informs the defendant's conduct in planning his strategy at the proffer session and at trial. 5 F.3d at 1068. The government's insistence on such a waiver as a condition of entering into plea negotiations does not put defendants in an untenable position, the court explained, because it harms the defendant only if the defendant "elicits or produces inconsistent testimony at a later date." 5 F.3d at 1069. Holding a defendant to the terms of the proffer, the court noted, "fosters another laudable policy—encouraging defendants to tell the truth during both plea negotiations and subsequent trials." *Ibid.* The

Seventh Circuit accordingly upheld the validity of the waiver.

The Seventh Circuit's decision accords with decisions in other circuits, which have either enforced or assumed the validity of similar waiver agreements. See, *e.g.*, *United States* v. *Perrone*, 936 F.2d 1403, 1412 ("Given Perrone's inconsistent testimony and his earlier agreement that statements from plea discussions could be used to rebut such testimony, there is no merit to [his] argument that allowing such rebuttal was improper."), clarified on other grounds on reh'g, 949 F.2d 36 (2d Cir. 1991); *United States* v. *Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (noting that "[p]lea agreements * * * commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is inadmissible as substantive evidence of guilt, but is admissible for purposes of impeachment," and that a defendant who signs such an agreement "waives the protection of Fed. R. Crim. P. 11(e)(6) for the purposes of impeachment"). But cf. *United States* v. *Acosta-Ballardo*, 8 F.3d 1532 (10th Cir. 1993) (suggesting agreement with the decision below).

2. The court of appeals' decision invalidates, in the Ninth Circuit at least, an important and widespread practice employed as a part of plea bargaining and cooperation arrangements. Waiver agreements like the one invalidated by the court of appeals are routinely used in many districts and are often an important element in the government's willingness to participate in plea discussions with defendants who proffer their cooperation. Such agreements are used not only by United States Attorneys' Offices throughout the country (including nearly all the

offices in the Ninth Circuit), but also by the Criminal Division of the Department of Justice.

The court of appeals' ruling significantly hinders the government's ability to obtain reliable information from cooperating witnesses. A prosecutor often will be unable to judge the value of a defendant's information to other investigations, or the usefulness of his testimony in other trials, without extensively questioning him—*i.e.*, securing his statements as part of "plea discussions" under Rules 410 and 11(e)(6). But the prosecutor may be unwilling to use the facts proffered by the defendant as the basis for charging or convicting other persons when the defendant wishes to retain the ability to change his story under oath when his own liberty is at stake.[1] It is reasonable for a prosecutor to conclude that a defendant who is willing to cooperate in the prosecution of others only on those terms has little of value to offer to the government. By effectively freeing suspects and criminal defendants to take casually the truth of the statements they make to the prosecutor, the court of appeals has deprived the government of an important check on the reliability of statements made by cooperating witnesses.

[1] If the government lacks effective means of policing the truthfulness of the information proffered by the defendant—such as the means supplied by the agreement condemned by the court below—the defendant's testimony will be subject to ready impeachment when the government attempts to use it in the prosecution of others. To the extent the defendant's testimony is nonetheless credited by a jury, the absence of such a necessary check on its veracity may increase the number of instances in which the prosecutor unwittingly presents, and a jury consequently relies on, false testimony—thereby seriously disserving important constitutional values.

The court of appeals' analysis also reflects little consideration of the incentives that its ruling creates for criminal defendants. Under the court's rule, a defendant will be free to use his proffer of cooperation as an opportunity to "try out" a story on the prosecutor. That tactic will permit the defendant to gain the best of all worlds: favorable treatment if the prosecutor is persuaded, and an opportunity to swear to a different version of the events at his trial—without fear of contradiction and aided by any facts he learns during the proffer session—if the prosecutor is not persuaded.[2] The court of appeals' refusal to recognize a waiver of Rules 410 and 11(e)(6) therefore allows defendants to pervert those rules "into a license to use perjury by way of a defense," *Harris* v. *New York*, 401 U.S. 222, 226 (1971), and "to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976). That result is flatly contrary to the basic guide to the interpretation of those rules—*i.e.*, that the rules "shall be construed to secure fairness in administration * * * to the end that the truth may be ascertained

[2] That is exactly what respondent attempted to do in this case. After failing to persuade the AUSA, respondent not only testified to a completely different version of his involvement in methamphetamine trafficking, but he also took care to admit that he had been present on Shuster's property on the day before his arrest—and thereby attempted to neutralize the surveillance evidence about which he learned during his meeting with the prosecutor and the agents. Indeed, defense counsel argued in summation that the jury should believe respondent's story because that story was confirmed by the government's surveillance evidence. Tr. 420.

and proceedings justly determined." Fed. R. Evid. 102; see also Fed. R. Crim. P. 2.

The court of appeals justified its broad rule of nonwaivability in part on the ground that courts must protect "a defendant who is in a weak bargaining position" in order to prevent governmental abuse. App., *infra*, 9a. This Court, however, has always proceeded on the assumption that "the mutuality of advantage" inherent in plea bargaining means that "'the prosecution and defense * * * arguably possess relatively equal bargaining power.'" *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362, 363 (1978) (quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)). See also *United States* v. *Goodwin*, 457 U.S. 368, 377-378 (1982). For that reason, the best protection against the possibility of abuse is the adversarial process of bargaining itself. A defendant who has the assistance of competent counsel, as respondent did, can decide not to waive his rights under Rules 410 and 11(e)(6) in the first place, and if the prosecutor refuses to engage in plea bargaining absent such a waiver, the defendant can refuse to cooperate with the government and insist on his right to stand trial. And if the plea negotiations break down, the defendant is free to go to trial, burdened only by the knowledge that if he testifies inconsistently with his proffer statement, the prosecutor will be free to impeach him with that prior inconsistent statement. That weapon in the prosecutor's arsenal may make going to trial marginally less attractive to the defendant, but it does not foreclose that option altogether, and it certainly does not make it more likely that the trial will produce an unreliable result. Because the parties are free to negotiate over the

terms of the waiver, it is difficult to see why the availability of a waiver as one of the options for the parties to bargain over is inherently abusive or why it warrants the broad *per se* rule adopted by the court of appeals.

3. Both this case and the conflicting Seventh Circuit decision in *Suess* v. *United States*, No. 93-7218, are before the Court at the same time. We believe that this case presents a better vehicle than *Suess* for resolving whether a defendant may waive the protections of Rules 410 and 11(e)(6), because Suess did not adequately raise the issue of waivability in the district court. While the Seventh Circuit resolved that issue on the merits, Suess's conviction would be subject to reversal by this Court only if the admission of the evidence was "plain error." A decision by this Court limited to the question of plain error would not necessarily resolve cases in which a defendant timely raises the question presented here. For that reason, we suggest that the better course would be to grant this petition and to hold the petition in *Suess* pending the resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY MEZZANATTO, DEFENDANT-APPELLANT

No. 92-50261
D.C. No. 91-739-01-EBG

Appeal From the United States District Court
for the Southern District of California
Earl B. Gilliam, District Judge, Presiding

Argued and Submitted
February 2, 1993—Pasadena, California

Filed July 7, 1993

Before: J. Clifford Wallace, Chief Judge, Joseph T. Sneed and Cynthia Holcomb Hall, Circuit Judges

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Opinion by Judge Sneed; Dissent By
Chief Judge Wallace

SNEED, Circuit Judge:

Appellant challenges the district court's ruling allowing the prosecution to introduce statements he made during failed plea negotiations for impeachment purposes. We reverse the appellant's conviction and remand for a new trial.

I.

FACTS AND PRIOR PROCEEDINGS

Appellant Gary Mezzanatto was charged with possession of methamphetamine in violation of 21 U.S.C. § 841(a)(1). At Mezzanatto's request, the government held a plea bargaining meeting with him. Before the start of this meeting, the prosecutor informed Mezzanatto that any statements he made during the meeting could be used to impeach any inconsistent testimony he offered at trial, if the case proceeded that far. Mezzanatto agreed to this, and the meeting began. The parties did not reach an agreement.

At trial, Mezzanatto offered testimony that was inconsistent with statements he made during the negotiations. The government introduced the prior statements to impeach Mezzanatto. The appellant objected, but the court overruled the objections and allowed the statements for impeachment.

The jury found Mezzanatto guilty, and the district court imposed a 170 month prison term to be followed by five years of supervised release.

II.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. Whether plea negotiation statements may be introduced to impeach a defendant and whether a defendant may waive the prohibition against the introduction of plea negotiations statements are questions of law and of statutory interpretation, and therefore, we review these issues de novo. See *Anderson v. United States*, 966 F.2d 487, 489 (9th Cir. 1992).

III.

DISCUSSION

A. *Issues on Appeal.*

This appeal involves Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6). Rule 11(e)(6) is nearly identical in form and is identical in substance to Rule 410. Rule 410 reads:

> **Inadmissibility of Pleas, Plea Discussions, and Related Statements**
>
> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
>
> (4) any statements made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Before reaching the primary issue this case presents, whether a defendant may waive the prohibition against the introduction of statements made during plea negotiations, we examine the scope of the two rules.

B. *The Scope of the Rules.*

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) are quite clear that statements made in the course of plea discussions are generally not admissible at trial. In only two instances are plea negotiation statements admissible. The first is an exception to prevent selective admission of plea negotiation statements. If a defendant introduces a statement made during plea negotiations, the prosecution may introduce other relevant plea negotiation statements so that the jury receives a full account of the issue presented. The only other exception allows for the admission of certain plea negotiation statements in a separate proceeding against the defendant for perjury. This exception is designed to permit punishment of defendants who take the stand and testify contrary to their plea negotiation statements. These two exceptions to an otherwise absolute rule do not include the use of such statements for impeachment.

The legislative history of these Rules is quite clear that plea negotiation statements are not admissible to impeach a defendant. A version of Rule 410, which never became effective, did allow plea negotiation statements to be introduced for impeachment, but this language was ultimately rejected. S. Rep. No. 1277, 93d Cong., 2d Sess. 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057; H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 10 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713; *see also* Fed. R. Evid. 410 (1974); Pub. L. 94-149, 89 Stat. 805 (1975). Congress unmistakably did not want statements made during plea negotiations to be used to impeach defendants. Detailing this history concerning impeachment, the Second Circuit said, "We regard this legislative history as demonstrating Congress' explicit intention to preclude use of statements made in plea negotiations for impeachment purposes." *United States v. Lawson*, 683 F.2d 688, 692-93 (2d Cir. 1982); *accord United States v. Martinez*, 536 F.2d 1107, 1108 (5th Cir. 1976).

Commentators offer no disagreement. *See, e.g.*, Charles A. Wright & Kenneth W. Graham, Jr., 23 Federal Practice and Procedure § 5349 (1980); David W. Louisell & Christopher B. Mueller, 2 Federal Evidence § 188 (1985). No one argues that Congress did not mean what it said.

This brings us to the issue to which Congress did not speak. Can the defendant waive the protection of these rules?

C. *The Protection Against the Admission of Statements Made During Plea Negotiations Cannot Be Waived.*

The issue of waiver of the protection of Rules 410 and 11(e)(6) is one of first impression.[1] The government contends that this rule may be waived by a defendant, and it argues that Mezzanatto knowingly and intelligently waived this protection. Mezzanatto insists that the prohibition in Rules 410 and 11(e)(6) may not be waived. We agree with the appellant.

The importance of the prohibition against the admission of plea negotiation statements is best understood in the broader context of the criminal

[1] This issue was before the District of Columbia Circuit, but it resolved the case on other grounds. *United States* v. *Wood*, 879 F.2d 927, 937 (D.C. Cir. 1989).

justice system. Plea bargains are an important and useful part of our criminal justice system.[2] They allow criminal cases to be resolved in a quick and cost effective manner while maintaining the just administration necessary to the criminal justice system. Rules 410 and 11(e)(6) were designed to promote plea agreements by encouraging frank discussion in negotiations because such unrestrained candor promotes effective plea bargaining. See Fed. R. Crim. P. 11 adv. comm. note (1979), *reprinted in* 18 U.S.C. App. (1988).

For instance, prosecutors of those engaged in criminal conspiracies desire the fullest cooperation of those accused of participation therein. Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted. Rules 11(e)(6) and 410(4) aid in obtaining this cooperation. A lesser member of the conspiracy will more freely provide useful information to the prosecutors if he knows that none of his statements in plea bargaining sessions can be used against him.

Moreover, full cooperation may enhance the prospects of a better plea bargain from the prosecutor. In a sense, most defendants who enter plea bargaining do so with the prospect of exchanging information about other offenses or defendants for a lesser punishment for themselves. The rules at issue here permit the plea bargainer to maximize what he has "to sell" with the ability to withdraw from the

[2] See *Blackledge* v. *Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 1627, 62 L.Ed.2d 136 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."); *Santobello* v. *New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.E.2d 427 (1971) ("Disposition of charges after plea ~~discussions is~~ not only an essential part of the process but a highly desirable part for many reasons.").

bargain proposed by the prosecutor without being harmed by any of his statements made in the course of an aborted plea bargaining session.

To allow waiver of these rules would be contrary to all that Congress intended to achieve. If these rules were subject to waiver, candid and effective plea bargaining could be severely injured. As the Eighth Circuit aptly explained, "[m]eaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976). Waiver of the protections of Rules 410 and 11(e)(6) could easily have a chilling effect on the entire plea bargaining process. See Wayne R. LaFave & Jerold H. Israel, 2 Criminal Procedure § 20.2, at 611 (1984).

The government, not unreasonably, argues that since defendants can waive other statutory and constitutional rights, they should be able to waive Rules 410 and 11(e)(6).[3] They rely on *Newton v. Rumery*,

[3] It is unclear whether the prohibition against the admission of plea negotiation statements in Rules 410 and 11(e)(6) should be considered an administrative rule or a personal right. But even if the prohibition is labeled a personal right, it is still not waivable. As the Supreme Court said nearly half a century ago, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. . . . Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 900, 89 L.Ed. 1296 (1945) (footnote and citations omitted). Allowing a waiver of these rules would contravene and thwart the policy—efficient case resolution through plea bargaining—these rules were designed to effectuate.

480 U.S. 386, 107 S. Ct. 1187, 94 L.Ed2d 405 (1987), and *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1488 117 L.Ed2d 629 (1992), to support this argument. Neither these cases nor the analogy support the existence of a waiver power for these Rules.

In *Newton*, Mr. Rumery relinquished his personal right to pursue a civil remedy against the town of Newton, New Hampshire, which had arrested him, in exchange for a dismissal of all criminal charges against him. 480 U.S. at 390, 107 S. Ct. at 1190. The issue before the Court was whether such a "release-dismissal" agreement should be considered unenforceable as against public policy. *Id.* at 389, 107 S. Ct. at 1190. Although the Court agreed that such agreements may infringe on important interests of criminal defendants and society, *id.* at 392, 107 S. Ct. at 1191, the Court held that the agreement was enforceable because the "agreement would not adversely affect the relevant public interests." *Id.* at 398, 107 S. Ct. at 1195 (footnote omitted).

That conclusion is inapplicable to the situation here. To allow the government to enforce its waiver agreement would, as already pointed out, adversely affect the public interest in efficient criminal case resolution. Furthermore, *Newton* dealt with the waiver of a civil remedy and a dismissal of criminal charges. Unlike the present situation, the range of possible adverse consequences to society in *Newton* is quite small.

Navarro-Botello does not help the government, either. The government argues that since defendants can waive the right to appeal, as in *Navarro-Botello*, 912 F.2d at 319-20, or certain other constitutional rights, a defendant should be able to waive the right to exclude plea negotiation statements. It is indisputable that defendants can waive certain rights during plea negotiations. But to allow waiver of Rules 410 and 11(e)(6), which are part of the plea bargaining mechanism, could damage the system approved by Congress and the Supreme Court. They do not guarantee substantive rights so much as they guarantee fair procedure.

To equate the waiver of these rules with that of an asserted constitutional protection is a false equality. Judicially created waivers of the latter are the result of an inescapable feature of courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. Given the precision with which these rules are generally phrased, the comparative recentness of their promulgation, and the relative ease with which they are amended, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule.

Furthermore, the government should not be given the ability to extract a waiver of these rules from a defendant who is in a weak bargaining position. It should be noted that the government extracted the attempted waiver from Mezzanatto, not as part of a plea bargain, but simply as the price for the opportunity to enter into discussions that could have, but did not, lead to a plea bargain. With such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy.

We therefore hold that the prohibition against the admissibility of statements made during plea negotiations is not subject to waiver.[4]

D. *The Error Was Not Harmless.*

Federal Rule of Criminal Procedure 11(h) requires a harmless error standard to be used for violations of plea bargaining rules. The same standard is applied for violations of Rule 410. *See Lawson*, 683 F.2d at 693. The contradictory impeachment evidence was clearly a significant blow to the appellant's defense. It easily could have altered the balance in the eyes of the jury. Therefore, we find the error was not harmless and set aside the conviction and reverse the judgment and remand to the district court.

We find no merit in the remainder of the appellant's contentions, but we direct the district court's attention to the Supreme Court's teachings in *United States v. Dunnigan*, ___ U.S. ___, 113 S. Ct. 1111, 122 L.Ed2d 445 (1993), should resentencing be required.

REVERSED and REMANDED.

WALLACE, Chief Judge, dissenting:

A criminal defendant may waive the most fundamental rights and protections afforded him or her by the Constitution or a statute. *Peretz v. United States*, ___ U.S. ___, ___, 111 S. Ct. 2661, 2669, 115 L.Ed2d 808 (1991); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (*Navarro-Botello*),

[4] We are not holding that the introduction of plea negotiation statements is per se reversible error. If a defendant fails to object at trial to the introduction of such testimony, he has implicitly waived the protection. Furthermore, as is explained in the following part, any error is subject to a harmless error analysis.

cert. denied, ____ U.S. ___, 112 S. Ct. 1488, 117 L.Ed2d 629 (1992). A defendant, for example, may knowingly and voluntarily waive the Fourth Amendment right to be free from warrantless searches, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2058, 36 L.E.2d 854 (1973); the Fifth Amendment privilege against self-incrimination, *see Navarro-Botello*, 912 F.2d at 321; the Sixth Amendment rights to counsel, *see Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2540, 45 L.Ed2d 562 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 1023, 82 L.E.2d 1461 (1938), to a jury trial, and to confront and cross-examine witnesses, *see Navarro-Botello*, 912 F.2d at 321; and the statutory rights to appeal, *see id.*, and to pursue valid civil rights claims against government officials, *see Town of Newton v. Rumery*, 480 U.S. 386, 392-98, 107 S. Ct. 1187, 1191-95, 94 L.Ed.2d 405 (1987) (*Newton*).

A defendant, by failing to object at trial, also may implicitly waive his or her Fourth Amendment right against unlawful search and seizure, *see Segurole v. United States*, 275 U.S. 106, 110-11, 48 S. Ct. 77, 79, 72 L.Ed.2d 186 (1927); Fifth Amendment privilege against self-incrimination, *see United States v. Coleman*, 707 F.2d 374, 376 (9th Cir.), *cert. denied*, 465 U.S. 854, 104 S. Ct. 171, 78 L.Ed.2d 154 (1983), and against being placed in double jeopardy, *see United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S. Ct. 3476, 3477, 87 L.Ed.2d 613 (1985); and Sixth Amendment rights to be present at all stages of trial, *see United States v. Gagnon*, 470 U.S. 522, 528, 105 S. Ct. 1482, 1485, 84 L.Ed.2d 486 (1985), and to a public trial, *see Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L.Ed.2d 989 (1960). As the Supreme Court summarized, "No procedural principle is more familiar to

this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L.E.2d 834 (1944).

Against this backdrop, the majority creates, without the assistance of precedent, a per se rule which invalidates any and all waivers of the protection afforded not by such basic and fundamental rights, but by Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) (collectively Rules). The majority brushes aside the question whether the waiver is knowing and voluntary; the newly crafted majority directive is absolute. The bases of this ruling are that to allow waiver would subvert the policies advanced by the Rules, that writing in a waiver would amount to "unwelcome advice," maj. op. at 7049, and that the availability of waivers would tempt governmental abuse. Because none of these bases supports the majority's position, and because there is no principled way to set these particular Rules apart from the vast majority of rules and rights that are subject to waiver, I dissent.

I

As for the first basis, that allowing waivers would subvert the policies advanced by the Rules, I have several objections. I start with what is not said: the majority has not identified what is so unique about the Rules that warrants a solicitude extended to very few rights or rules. At one point the majority states, without more, that the Rules should not be waived because they guarantee "fair procedure" rather than substantive rights. Maj. op. at 7049. Yet earlier in the opinion, the majority deems this distinction

irrelevant, and goes on to suggest that "personal right[s]" should be *less* subject to waiver than administrative procedural rules. *Id.* at 7048 n. 3. This apparent contradiction is symptomatic of the majority's futile search for a sound distinction between the Rules and all those rules subject to waiver.

A distinction does not appear warranted based on policy, for surely the policies behind the Rules are no more important than the policies advanced by those rights and rules that may be waived. It would be difficult to conclude, for example, that the policy of quickly and cheaply resolving cases is more important than the policy of securing ourselves in our "persons, houses, papers, and effects." U.S. Const. amend. IV. Yet the criminal defendant who is subject to an unreasonable search and seizure may knowingly waive his Fourth Amendment rights as part of a plea bargain, or he may implicitly waive those rights by failing to object to the introduction of the resulting evidence. If a criminal defendant may waive such a fundamental constitutional right, I fail to see why the policies behind the Rules should preclude a criminal defendant, like Mezzanatto, from knowingly and voluntarily waiving the protection afforded by the Rules.

Nor does it appear that the effect of allowing waivers would be any greater in this context than it is in others. In fact, that effect may be diminished by the exception to the Rules that allows statements made during plea bargaining to be used in later criminal proceedings for perjury. *See* Fed. R. Evid. 410(ii); Fed. R. Crim. P. 11(e)(6)(ii). Allowing a defendant to waive the bar against using his or her plea-related statements for impeachment purposes, therefore, merely enhances a deterrent which already exists within the Rules. Thus, if the policies rep-

resented by the Rules are no more important, and the subversive potential of waivers no greater in this context, there is little ground for distinguishing the Rules from the plethora of rules and rights subject to waivers.

The majority nonetheless contends that to allow waivers would be an injury not only to the defendants affected, but to the administration of the criminal justice system as a whole. Maj. op. at 7046-48. Although I recognize the possibility for harm to defendants and the criminal justice system that allowing waivers might create, I do not think this possibility justifies a per se rule against waivers. *See Newton*, 480 U.S. at 392, 107 S. Ct. at 1191 (holding mere possibility of harm to societal interests insufficient to create a per se rule against release-dismissal agreements). On the contrary, I believe that the majority, by implicitly vaulting plea agreements to the apex of goals sought to be achieved within the criminal justice system, has exaggerated greatly the potential harm represented by waivers.

I begin with the potential injuries to defendants. The defendant who waives his right to give inconsistent testimony at trial should the plea bargain prove fruitless seems to forfeit one "right" directly: the "right" to lie. By forfeiting his ability to provide inconsistent testimony at trial, the defendant has forsaken—or at least diminished—his "right" to lie at some stage of the prosecution. The defendant who forsakes this "right," of course, has sacrificed nothing, as no defendant has the "right" to provide false testimony. *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S. Ct. 988, 997, 89 L.Ed.2d 123 (1986).

Another potential injury to future defendants—though not the defendant in *this* case—identified by the majority is that they may be compelled to forsake

their "right" to plea bargain, if they find that the price of waiver is too high to pay. Such hypothetical defendants also sacrifice a "right" which they never possessed. See *United States v. Wheat*, 813 F.2d 1399, 1405 (9th Cir. 1987) (holding that "there is no right to a plea bargain"), *aff'd*, 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988). In return for this sacrifice, these defendants must stand trial. Where is the harm to a defendant who is "coerced" into going to trial? The most consistent criticism waged against plea bargaining is that defendants are often coerced into pleading guilty to crimes they did not commit. *See generally Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31, 93 S. Ct. 1977, 1984-85, 36 L.Ed.2d 714 (1973) (discussing coercive potential of several common plea-bargaining tactics). The majority has turned this criticism on its head, by suggesting that the problem with waivers is that they will coerce defendants to forgo plea bargaining.

As for the majority's contention that waivers will have a chilling effect on plea bargaining, I see three flaws. First, this prediction is completely speculative. The only evidence we have of the effects of allowing waiver is one case, this one, and the evidence here contradicts the majority's speculation. It does not necessarily follow that defendants will not enter into plea bargains if they first must waive the protection that their statements cannot be used to impeach them at trial.

Second, even assuming the majority's speculation is accurate, I would expect the system to correct itself. The majority recognizes that plea agreements are beneficial not only to criminal defendants. *See* maj. op. at 7047-49. Such agreements, as the majority asserts, are of great importance to the efficient administration of the criminal justice system; they

are of value to the government. *Id.* Given the mutual benefits achieved through plea bargaining, should we expect the government continually to require waivers if such requirements significantly reduce the number of plea agreements reached?

Third, if the number of plea agreements actually does decrease, and more criminal defendants proceed to trial, it does not necessarily follow that the criminal justice system will fail. An unexplored presumption in the majority's opinion is that a reduction in the number of plea bargains would somehow undermine our criminal justice system. I am not certain that the success or failure of criminal justice necessarily turns upon the present rate of plea bargaining. To be sure, more trials would add increased burdens to an already overcrowded court system, but I am not prepared to give such weight to the possible advent of more trials as does the majority.

II

The majority's second rationale appears to be that we should not "write in a waiver" because it is not an "inescapable duty," and it would amount to "unwelcome advice." *Id.* at 7049. Our inescapable duty, as I see it, is to apply the law as it is presented to us, whether it be in the form of constitution, statute, or common law. If our application requires that we interpret the law, we can and must interpret it. The notion that we should not interpret a statute if it is "recently" promulgated (although the Rules here are approximately 20 years old), phrased with "precision" (although the Rules here are silent on the only contested issue), and relatively easily amended is a troubling, if not baffling, addition to the canons of statutory construction.

As for the majority's suggestion that we can "escape" interpretation of the Rules by not "writ[ing] in a waiver," *id.*, I strongly disagree. Indeed, the majority's decision shows quite clearly that interpreting the Rules is unavoidable in this case. For what does the majority do but "write in" a prohibition against waiver into Rules which, as the majority recognizes, are silent regarding the issue? *See id.* at 7046 (recognizing that waiver is an "issue to which Congress did not speak"). Deciding not to allow waivers is every bit as interpretive as deciding that waivers should be allowed. The majority has simply inferred the opposite conclusion than I from Congress's silence.

In addition, given the plethora of rules and rights which can be waived and the paucity of those which cannot, the majority's decision that the Rules here are among the select few unsuited for waiver is a significant act of judicial interpretation. As described at the outset of this dissent, the clear weight of judicial precedent is to allow knowing and voluntary waivers of rights and rules, even where those rules are completely silent regarding waivability. In reading Congress's silence as an indication that waivers should be prohibited, the majority has not only interpreted the Rules, but it has done so in a manner which runs counter to that precedent. Characterizing this interpretation as an act of judicial deference, in my view, is both inaccurate and insufficient to justify the majority's conclusion.

III

The majority's third contention for a per se rule is that waivers allow for governmental abuse. Unfortunately for the majority, this rationale was rejected by the Supreme Court in *Newton*. 480 U.S.

at 396-97, 107 S. Ct. at 1193-94. In refusing to fashion a per se rule against release-dismissal agreements, the Court observed that such a rule improperly "assumes that prosecutors will seize the opportunity for wrongdoing." *Id.* at 396, 107 S. Ct. at 1193. The majority here relies on this rejected assumption, despite the lack of any factual basis for doing so. Indeed, in this case it is clear that Mezzanatto knowingly and voluntarily waived the protections offered by the Rules. The answer is clearly stated by the Supreme Court: "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Id.* at 397, 107 S. Ct. at 1194. Given this tradition and experience, it strikes me as unwarranted to fashion a rule based on the assumption that the government will exploit unwitting defendants if given the opportunity.

IV

Finally, a more generalized comparison between *Newton* and this case highlights the shortcomings in the majority's analysis. In *Newton*, the Supreme Court condoned release-dismissal agreements, whereby the government agrees to drop criminal charges against a defendant in exchange for the defendant's agreement not to pursue a civil rights claim against government officials.

The potential result of such an agreement is that the government drops legitimate criminal charges and the defendant drops legitimate civil rights claims. The Court recognized that these agreements may in some cases infringe important societal interests, but concluded that the "mere possibility of harm to these interests" does not justify a per se rule. *Id.* at 392, 107 S. Ct. at 1191.

The same conclusion is applicable to this case. The interests at stake here are certainly no more compelling. Notwithstanding the majority's somewhat startling assertion that "the range of possible adverse consequences to society in *Newton* is quite small," maj. op. at 7049, few would argue that ensuring the success of plea bargaining is more important than sanctioning government officials who commit civil rights violations. In addition, the potential for coercion seems much slighter here, and the potential consequences of any coercion less troubling. The defendant in *Newton* gave up a potentially legitimate civil rights suit; Mezzanatto, by contrast, gave up his ability to provide inconsistent testimony. Because the Supreme Court did not see fit to fashion a per se rule against release-dismissal agreements, I cannot accept the majority's new per se rule in this context.

V

Mezzanatto requested the government to engage in plea discussions. Before those discussions began, he knowingly and voluntarily agreed that the testimony he provided during plea bargaining could be used to impeach him should he provide inconsistent testimony at trial. This is precisely what occurred. I see no reason not to honor Mezzanatto's agreement with the government. Because I would hold that the introduction of Mezzanatto's plea-bargaining statements was permissible, I would not need to reach the question of whether this alleged error was harmless. In addition, Mezzanatto's other challenges to his conviction and sentence are without merit. Thus, I would affirm.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50261
D.C. No. 91-739-01-EBG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY MEZZANATTO, DEFENDANT-APPELLANT

[Filed: November 9, 1993]

BEFORE: WALLACE, CHIEF JUDGE, SNEED AND HALL, CIRCUIT JUDGES

Chief Judge Wallace voted to grant appellee's petition for rehearing and to accept the suggestion for rehearing en banc; Judges Sneed and Hall voted to deny appellee's petition for rehearing; Judge Hall voted to reject the suggestion for rehearing en banc; and Judge Sneed recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

Rule 102, Fed. R. Evid., provides:

Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 410, Fed. R. Evid., provides:

Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if

the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 2, Fed. R. Crim. P., provides:

Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 11(e)(6), Fed. R. Crim. P., provides:

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a

criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Supreme Court, U.S.
FILED
MAR 22 1994
OFFICE OF THE CLERK

No. 93-1340

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY MEZZANATTO,

Respondent.

Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether the Justice Department's waiver rule violates the public policy behind Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6).

II

Whether the Justice Department's waiver rule violates separation of powers principles.

III

Whether the Justice Department's waiver rule lends itself to prosecutorial vouching.

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INTRODUCTION

In one form or another, the guilty plea has been with the common law for some 500 years. See, *North Carolina v. Alford*, 400 U.S. 25, 35-36, n. 8 (1970); 13 Law & Society Review 211, 214 (1979). Plea-bargaining, as we know it today, probably began in this country in the nineteenth century. 13 Law & Society, *supra*, at pp. 224-227. By the 1920's, plea-bargaining had grown into an institution of the American criminal justice system. *Id.* at pp. 227-229, 235; 79 Colombia Law Rev. 1, 29 (1979). The growth of urban culture and the associated rise in crime required an expedient to manage the ever-growing number of criminal cases. See, 13 Law & Society, *supra*, at pp. 235-240. As explained by the Supreme Court in *Blackledge v. Allison*, 431 U.S. 63, 71 (1976), "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of the country's criminal justice system. Properly administered, they can benefit all concerned."

Recognizing the importance of the overall plea process, Congress enacted Rule 11 of the Rules of Criminal Procedure, a monolith of the federal system. In 1974 and 1975 came the plea-statement rules, Rule 11(e)(6) of the Rules of Criminal Procedure and Rule 410 of the Rules of Evidence, (hereafter "The Rules" or "the plea-statement rules"). The Rules, in their present form, are the product of extended legislative activity – lengthy debates, countless drafts and revisions, and several amendments. By their terms, The Rules bar the admission of plea-statements at trial for any purpose. The drafters knew from history and experience that, if plea-bargaining were to play a meaningful part in the federal criminal justice

system, plea-discussions had to take place in a risk-free environment. Indeed, the broad exclusionary language of The Rules reflects this very wisdom.

The Justice Department thinks otherwise, putting into practice its waiver rule to undermine much of what The Rules were meant to accomplish. For several reasons, the government's waiver practice has no place in this statutory scheme. At a minimum, it subverts public policy and violates separation of powers principles. As such, this waiver rule should be held invalid, now and forever.

REASONS FOR DENYING THE WRIT

I

THE GOVERNMENT'S WAIVER RULE VIOLATES PUBLIC POLICY.

Federal Rule of Evidence 410 and Criminal Rule of Procedure 11(e)(6), create a blanket prohibition against the admission of plea-statements. Slip opn., pp. 7045-7046. Refusing to permit waivers[1] of The Rules' protections, the Court of Appeals held: "[T]o allow waiver of Rule 410 and 11(e)(6), which are part of the plea bargaining mechanism, could damage the system approved by Congress and the Supreme Court. They do

[1] By waivers, the Court of Appeals meant affirmative waivers – those waivers appearing on the face of the record – as opposed to procedural defaults. See, *United States v. Olano et al.*, ___ U.S. ___; 113 S.Ct. 1770, 1777 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' (Citations.)").

not guarantee substantive rights so much as they guarantee fair procedure."[2] App. 9a.

Four years before the enactment of The Rules, the Supreme Court in *Santobello v. New York*, 404 U.S. 257, 260-261 (1971) underscored the importance of plea-agreements, and the importance of fair procedures in securing them:

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. *Properly administered*, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

[2] The Dissent argued that the Majority's reference to The Rules as a procedure in one context, and as a right, in another, betrays a fundamental flaw in the Majority's analysis. Appendix, 12a-13a. But the Dissent's emphasis on labels overlooks a more basic aspect of this inquiry. In evaluating this issue, the Court should focus on the effect, rather than the semantics, of the government's waiver policy. The Majority recognized as much and explained, "To allow waiver of these rules would be contrary to all that Congress intended to achieve. . . . "). Appendix, 7a. Cf. *INS v. Chadha*, 462 U.S. 919, 965, n. 7 (1983) (conc. opn., Powell, J.) ("reasonable minds may disagree over the character of an act, and the more helpful inquiry, in my view, is whether the act in question raises the dangers the Framers sought to avoid."); Cf. *American Dredging Co. v. Miller*, ___ U.S. ___; 62 U.S.L.W. 4130, 4138 (1993) (dis. opn. J. Kennedy) ("Procedural or substantive, the forum non convenience defense promotes comity and trade. The States are not free to undermine these goals.")

> "Disposition of charges after *plea discussions* is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by, shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. [Citation.]
>
> "However, all of these considerations *presuppose fairness in securing agreement* between an accused and a prosecutor. . . . "

Italics added.[3]

Basic procedures governing plea-bargaining have been with the law for some time. See, *Hallinger v. Davis*, 146 U.S. 314, 324 (1892). The promulgation of Rule 11 of the Rules of Criminal Procedure, however, marked the beginning of what was to become a complete and detailed set of procedures controlling nearly all aspects of the plea process. Its purpose from the beginning has remained constant throughout its evolution – "The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts." See, Adv. Committee

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[3] See also, *United States v. Goodwin*, 457 U.S. 368, 378-379, n. 10 (1981) (importance of institution of plea-negotiation process); *Bordenkircher, Penit. Superintendent v. Hayes*, 434 U.S. 357, 364 (1977) (plea-negotiations must be encouraged).

Notes (1966 Amendments), reprinted in 18 U.S.C.A. Rule 11, p. 346. As an integral part of this enactment, the plea-statement rules share this common goal of "fundamental fairness." See, Advisory Committee Notes (1974 Amendments), reprinted in 18 U.S.C.A. Rule 11, p. 351.

For the most part, the common law and statutory views of plea-bargaining have developed along the same line. Both have seen the tremendous benefits plea-bargaining has brought to the criminal justice system. Yet, in some respects, Congress' conception of plea-bargaining is more expansive than the one generally voiced by the Supreme Court. In discussing the benefits of plea-bargaining, the Court has usually spoken of its value in terms of saving time, expense and resources, or in terms of its rehabilitative effect. See, *Brady v. United States*, 397 U.S. 742, 753 (1969).

The Judicial Committee ("The Committee") of Rule 11 recognized this much, but believed plea-bargaining could go further. Specifically, plea-bargaining was seen as a tool to investigate and prosecute criminals. "For example," the Committee noted, "the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement." See, Notes of Judiciary Committee (1975 Amendment), reprinted in 18 U.S.C.A. Rule 11, p. 353. The Committee also observed: "Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. . . . " See, *Id.*

at p. 350.[4] Thus, law enforcement concerns, among others, figured into the overall statutory calculus.[5]

More often than not, plea-bargaining starts with discussions between the defendant, (his attorney), and the prosecutor. See, Louisell & Mueller, 2 Fed. Evid., "Rule 410," § 187 p. 539 (1989 ed.). As such, The Rules function as the catalyst of the whole plea-bargain system, setting into motion the events culminating in a judicially-approved plea-agreement. See, Charles A. Wright & Kenneth W. Graham, Jr. 23 Federal Practice and Procedure, § 5341, p. 353. This is their role and their end. And, to this end, The Rules were designed to encourage plea-discussions by creating a free and open atmosphere. See, Louisell & Mueller, 2 Fed. Evid., *supra*, § 187, p. 535 ("The intent of both [Rules] is to facilitate plea bargaining, by making it possible for defendants to engage in dialogue with prosecutors without fear that what they say may be used against them if the effort to negotiate a plea ultimately fails.").[6]

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[4] Thus, the Majority's analysis of The Rules is not only persuasive, but also representative of Congress' thinking at the time of their enactment and subsequent amendments. See, Appendix 6a-7a.

[5] The Dissent's belief that a reduction in the number of plea agreements will not necessarily harm the criminal justice system appears untenable in light of what has been said by the Court and Congress. Appendix 16a; See, *Brady v. United States*, *supra*, 397 U.S. at p. 752, n. 10 (estimate that 90-95% of all criminal cases end in guilty pleas).

[6] So important is this underlying policy that the protections of the plea-statement rules extend to sentencing proceedings. See, U.S.S.G. § 1B1.8, App. n. 3

With this aim in mind, the Advisory Committee conceived The Rules to have the broad effect of excluding all plea-statements for any purpose. See, Wright, 23 Fed. Prac., *supra*, § 5341, pp. 333-334. This baseline proposition did not sit well with the Justice Department. Justice, the government believed, would not be served unless plea-statements could be admitted for impeachment. This point was hotly contested, not only during the drafting and adoption of The Rules, but also during their subsequent amendments. Yet, throughout this ongoing debate, this application of The Rules never changed. See, *Id.* at pp. 339-348.

These pressures, however, were to affect The Rules in the other ways. Specifically, Congress amended The Rules to provide for admission of a plea-statement in a perjury prosecution, where the plea-statement was made under oath and in the presence of counsel. *Id.*, at pp. 344-345. This narrow exception posed a potentially serious impediment to open and candid plea discussion, and the Advisory Committee knew it. Yet, on the whole, the Committee believed that this limited amendment was necessary to ensure the integrity of the judicial process:

> "The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the

> judicial process from willful deceit and untruthfulness. . . . "[7]

See, Notes of Judiciary Committee, reprinted in 18 U.S.C.A. Rule 11, at pp. 353-354; See also, 2 Fed. Evid., Louisell & Mueller, *supra*, § 184, p. 517 (exception seen as a compromise of Justice Department's efforts).

This discussion so far gives but a brief sketch of the complicated and extended development of the plea-bargain process. In view of the legislative history of Rule 11 in general and of the plea-statement rules in particular, and in light of their overriding purpose and their comprehensive and detailed language, we must accept the basic proposition that Congress intended to establish absolute procedures for the plea-process. Cf. *United States v. Mississippi Valley Co.*, 364 U.S. 520, 550-551 (1960); See, *McCarthy v. United States*, 394 U.S. 459, 471-472 (1968).

In this case, and in others as well,[8] the government has found a defendant willing to waive the procedures and protections of The Rules. For the government, the willingness of a defendant alone is enough. But the Supreme Court has not been so quick to sanction waivers of legislation, legislation having such broad public importance. For example, in *Tony and Susan Alamo Foundation et*

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[7] Apparently, at the time of the preparation of this note, the Committee had not considered the other exception to The Rules, admission of a plea-statement to clarify a previously received plea-statement.

[8] See, *United States v. Dortch*, 5 F.3d 1056, 1067-1069 (7th Cir. 1993); *United States v. Stevens*, 935 F.2d 1380, 1396 (3rd Cir. 1991); *United States v. Goodapple*, 958 F.2d 1402, 1408-1409 (7th Cir. 1992).

al. v. Secretary of Labor, 471 U.S. 290 (1984), the Court held that employees of a business could not, as a matter of law and policy, waive the minimum protections of the Fair Labor Relations Act by agreeing to work without pay:

> "That the associates [employees] themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed worked 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. [Citations.] Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses. . . . "

Id. at p. 302; see also, *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 704 (1944) (no waiver of statute having strong public interest); *Barrentine, et al. v. Arkansas-Best Freight System Inc.*, 450 U.S. 728, 740 (1980) (no waiver of statute when it would thwart legislative policy); *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966) (agreement of parties unenforceable if it substantially impairs public policy interest protected by legislation); *Phillips v. Grand Trunk Ry.*, 236 U.S. 662, 667 (1914) (carrier may not change fixed and uniform statutory period of limitation by express waiver).

More recently, the circuit courts have decided that the provisions of the Speedy Trial Act are not waivable. The substantial public interest behind the Act prohibits waivers of its time-provisions, even though defendants have agreed to waive them:

> "In *Kington* [875 F.2d 1091 (5th Cir. 1989)], we joined all the other circuits which have addressed the question in recognizing that the provisions of the Speedy Trial Act are not waivable by the defendant. (Citations.) The Act is intended both to protect the defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved. Allowing the defendant to waive the Act's provisions would compromise the public interest in speedy justice. In the vast majority of cases, the defendant will be quite happy to delay the final determination of his guilt or innocence. The Act's central intent to protect society's interests requires that a defendant's purported waiver of his rights under the Act be ineffective to stop the speedy trial clock from running. . . . "

United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992).

In the same sense, The Rules are not so much statutes designed to protect the procedural rights of defendants as they are instruments of public policy embedded to preserve the institution of plea-bargaining.

To support the present waiver theory, the government and the Court of Appeals' dissenting opinion rely heavily upon *Town of Newton v. Rumery*, 480 U.S. 386 (1986). See, Pet. Cert., pp. 7-8. But *Newton* bears only a superficial resemblance to the present case. There, the

Court held that a defendant, under a release-dismissal agreement, may waive his right to prosecute a civil rights suit against the government in much the same way as a defendant may waive his various constitutional rights pursuant to a plea-bargain agreement. But while a release agreement may serve as a suitable analogy to a plea-*agreement*, *id.* at p. 393, n. 3, its logic does not extend to a plea-*discussion*. The government's failure to appreciate this distinction undercuts its entire analysis.

A plea-discussion, the beginning of the plea-bargain process, is several steps removed from the approved plea-agreement itself. To secure and consummate a plea-bargain agreement, Congress set in place various detailed procedures outlined in Rule 11. For example, a trial court must advise the defendant of the nature and consequences of a guilty plea, and the trial court must be satisfied with the factual basis for the plea. Fed.R.Crim.P. 11(c), 11(f). These and other features of Rule 11 make up the battery of procedures safeguarding the defendant throughout the course of the plea process.

To prevail under the rationale of *Newton*, *supra*, 480 U.S. 386, then, the government would have to convince this Court that the whole plea-bargain system, from beginning to end, is subject to the waiver rule. Given this well-integrated and unitary statutory scheme, this Court could not permit waivers of some of the Rule 11 provisions, but not of others. Cf. *United States v. Montalvo-Murillo*, 495 U.S. 711, 719 (1990) (may not treat provisions of an integrated Act differently). And, to allow waivers of all provisions of the plea-bargain mechanism would create profound problems. Taken to its logical conclusion, the government's waiver practice would require the trial

court to abandon many of its Rule 11 obligations. Surely, this result was never contemplated by Congress. See, Notes of Conference Committee (1983 Amendment), reprinted in 18 U.S.C.A. Rule 11, p. 363. ("it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this 'results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11.' (Citation").).

II

THE GOVERNMENT'S WAIVER RULE VIOLATES SEPARATION OF POWERS PRINCIPLES.

"The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers. (Citation.)" *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 468 (conc. opn., J. Kennedy) (1988). For this reason, the Constitution assigns a specific role to each of the three divisions of government. Article II of the Constitution obligates the Executive branch to "take Care that the Laws be faithfully executed." This constitutional charge begins with the President and flows to all the subordinate agencies and employees of the Executive branch. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992). As we shall see, through its waiver rule, the Justice Department (an agency of the Executive branch) has seriously undermined these separations of power principles.

In analyzing the legislative history of the plea-statement rules, the commentators have highlighted the Justice Department's peculiar involvement in their making. See, 23 Wright, Fed. Prac., *supra*, § 5341, pp. 334-348; 2 Louisell & Mueller, Fed. Evid., *supra*, § 184, pp. 509-518. From the outset, the Justice Department opposed a broad application of The Rules, viz., the exclusion of plea-statements for impeachment. At different times and in various ways during the legislative process, the Department of Justice sought to limit the scope of The Rules, but without success. *Ibid*. Now, through its insidious waiver policy – an apparently "widespread practice"[9] – the Justice Department renews its frustrated battle against the broad application of The Rules, this time without opposition from Congress. Cf. Wright, *supra*, § 5341, p. 347 ("a cynic might see in these proposals yet another chapter in the continuing saga of the Justice Department's efforts to restrict the scope of Rule 410 as narrowly as possible"). Pure and simple, by its present waiver rule, the government now attempts to do indirectly what it could never accomplish directly. Cf. *United States v. Stemm*, 847 F.2d 636, 638, n. 1 (10th Cir. 1988) ("The court cannot condone the Government accomplishing through indirect means what it promises not to do directly . . . ").

Perhaps, in one sense, this case presents a question of style and semantics; the Justice Department has framed its approach to plea-negotiating in familiar waiver

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[9] See, Pet. Cert., p. 10.

language.[10] [RT 366]. But should the constitutionality of the waiver policy be decided by its form or by its effect? Should the result be any different if, say, the waiver rule were expressed in more authoritative terms? See, *Youngstown Co. v. Sawyer*, 343 U.S. 579, 589-592 (1951) (written executive order). If we are to accept the wisdom of the Court's teachings, then any intrusion of one branch of government into the business of another, no matter how slight or subtle, should not be tolerated. See, *Public Citizen v. Dept. of Justice, supra*, 491 U.S. at p. 485 (conc. opn., J. Kennedy).

In spite of all that Congress considered and decided, the government relentlessly argues that certain law enforcement interests should outweigh any damage its waiver policy may cause the plea-bargain system or the defendant. Pet. Cert., pp. 11-14. In sum, the government forebodes the worst if this "weapon" were removed from the "prosecutor's arsenal." *Id.* at p. 13. But whatever merit these policies have in the abstract, they were never adopted by Congress. Cf. *United States v. Mississippi Valley Co.* 364 U.S. 520, 565 (1960) (result controlled by public policy of statute, not by balancing the equities); *Federal Deposit Ins. Corp. v. Meyer*, ___ U.S. ___; 62 U.S.L.W. 4138, 4143 (1993) ("Meyer's argument implicitly suggests that the funds used for indemnification could be shifted to cover the direct liability of federal agencies. That may or may not be true, but decisions involving "federal fiscal policy" are not ours to make . . . We leave it to Congress

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[10] In other contexts, waivers have been viewed as violating separation of power principles. See Generally, *United States v. Melancon*, 972 F.2d 566, 574 (5th Cir. 1992) (dis. opn., J. Parker).

to weigh the implications of such a significant expansion of Government liability."). In fact, many of these policy considerations, continuously pressed by the Justice Department, were ultimately rejected by Congress. Appendix 4a. The legislative process having ended, the government would have us now apply a balancing test to determine the propriety of its efforts to "improve" The Rules. See, *Public Citizen v. Dept. of Justice, supra*, 491 U.S. at p. 486 (balancing test not applied when the power to make the decision has been committed to a particular branch of government). *Youngstown, supra*, 343 U.S. at p. 588 ("The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.").

And, even if we were to meet the government's policy argument on its own terms – as a question to be rightfully decided by this Court – the government's position still remains unsound. The Justice Department argues that its waiver rule is an "effective means of policing the truthfulness of the information proffered by the defendant . . . " Pet. Cert., p. 11, n. 1. But the purported benefits of the waiver rule are more than offset by its detriments. For example, a defendant implicated in a criminal offense may well tailor his "proffer" statements to his anticipated defense, rather than fully reveal all the facts known to him. In so doing, the defendant avoids leaving a trail of impeachment evidence. Undoubtedly, this result runs counter to The Rules' objective.

What is more, the government's waiver rule invites prosecutorial abuse. Specifically, a prosecutor may use the plea-discussion setting as a pretext for what is in fact

an interrogation to gut the defendant's case. To illustrate, an Assisting United States Attorney, engaging in a plea-discussion, may have no interest in seeking information about other defendants or suspects, but instead may be solely concerned with the defendant's involvement in the offense. And, the prosecutor may have no intention of giving consideration for the defendant's "proffer," that is, deciding not to prosecute, or, deciding to recommend a departure from the Guidelines under U.S.S.G. § 5k1.1. See, *Oyler v. Boles*, 368 U.S. 448, 456 (1961) (government is free to selectively prosecute); *Wade v. United States*, ___ U.S. ___; 112 S.Ct. 1840 (1992) (claim of prosecutorial bad faith insufficient to obtain review of government's refusal to file 5k1.1 motion).

Instead, operating under the guise of a "proffer agreement," the prosecutor may well exploit the defendant's false hopes by obtaining damaging impeachment evidence to be used in the defendant's case. Ultimately, all of these potential problems were expressly or implicitly considered by Congress. Thus, the better course, as decided by Congress, is to create a risk-free environment so that a defendant may openly and candidly reveal all that he or she knows about the crime(s) under investigation.

In the final analysis, the Justice Department's "widespread practice" must be seen for what it truly is. Pet. Cert., p. 10. Whether this action travels under the banner of a "waiver," "a proffer agreement" or another nomenclature, whether it is characterized as a minor adjustment or as some other positive change,[11] the fact remains that

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[11] See, Pet. Cert., pp. 10-14.

the Justice Department has impermissibly crossed the constitutional divide. See, *Public Citizen, supra*, 491 U.S. at pp. 486-487. And, it is no answer to say, as does the Justice Department in this case, that the government has acted in good faith and for the benefit of the greater public interest. See, Pet. Cert., p. 11, n. 1; see, *United States v. Koyomejian*, 970 F.2d 536, 545 (9th Cir. 1992) ("It is not enough that Congress and the President honestly believe they are complying with the Constitution; the federal courts must perform an independent review to make sure they are right."). Above all, the Constitution is committed to the proper tri-partite structure of our government, not to the perceived needs of any one branch. Such is the absolute and unchanging nature of our Constitution.

Measured against these constitutional standards, the Dissent's and the government's arguments necessarily come up short. For instance, Chief Judge Wallace points out that even though the government's waiver policy may deter a defendant from entering a plea-bargain, still nothing is lost because a defendant has no right to enter a plea-bargain in the first place. Pet. Cert., p. 7; Appendix, 14a-15a. True, a defendant has no right to plea-bargain, but there are constitutional reasons for this as well. Compelling the government to enter a plea-agreement, or even a plea-discussion for that matter,[12] would violate the Justice Department's exclusive prosecutorial powers. *United States v. Redondo-Lemos, supra*, 955 F.2d at p. 1299.

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[12] See, *Infra*, p. 11 (a plea-discussion and a plea-bargain agreement are not synonymous).

But just as the judiciary or the legislature may not require the government to enter a plea-bargain agreement, so too the government may not dictate the terms under which a plea-negotiation is to be conducted. Congress has the prerogative, indeed a prerogative shared only with the Supreme Court, to create the *type* of environment in which a plea-discussion is to take place. See, *United States v. Abel*, 469 U.S. 45, 49 (1984) ("Although we [the Court] are nominally the promulgators of the Rules, and should in theory need only to consult our collective memories to analyze the situation properly, we are in truth merely a conduit when we deal with an undertaking as substantial as the preparation of the Federal Rules of Evidence."); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1940); 28 U.S.C. §§ 2072, 2073.[13] Congress has clearly defined the conditions of a plea-discussion through its enactment of the plea-statement rules. Thus, once the government decides to engage in a plea-discussion, it must do so according to the Congressional will. The government may not override The Rules to suit its own purposes, either on a case-by-case basis or as a blanket policy on all cases.[14]

Arguably, separation of powers is the unstated principle behind the holding of *United States v. Grant*, 622 F.2d

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[13] Thus, in one sense, the waiver policy violates the Supreme Court's exclusive rule-making authority.

[14] In passing, the Dissent observed that, in this case, the defendant, not the government, initiated the plea-negotiation. Appendix, 19a. But surely the dissent does not propose that the application of The Rules should turn upon this distinction. For, if they did, The Rules would effectively promote the very "cat-and-mouse" game Congress intended to abolish.

308 (8th Cir. 1980). The question in *Grant* was whether statements made by the defendant to FBI agents, who were authorized by the prosecuting attorney to conduct plea-negotiations, came within the protection of The Rules. On appeal, the government argued that they did not because the statements were actually made to the law enforcement officials without the presence of a government attorney as required by the literal language of the then-newly amended provisions. The Court of Appeals disagreed, reasoning that if the statements were not excluded "government attorneys *might attempt to avoid the operation of the rules* by authorizing law enforcement officials to conduct plea negotiations." *Id.* at p. 313, italics added.

While the facts of *Grant* are narrow and distinguishable from those of the present case, *Grant*, in principle and in language, argues for the broad proposition that the government may not create various schemes to circumvent the purpose and intent of The Rules. So too in this case, the Justice Department may not undermine The Rules by devising waivers of their protection.

If we bring this separation of powers analysis to the surface, and apply it to the text of The Rules, the same result follows. The Rules speak in mandatory terms: "[E]vidence of the following *is not* . . . admissible against the defendant who made the plea or was a participant in the plea discussions." Fed.R.Crim.P. 11(e)(6), italics added. If we go beyond The Rules themselves and look at Rule 11 as a whole, we see that Congress was specific in its use of mandatory and permissive language. Compare, Fed.R.Crim.P. 11 ("may" v. "shall" in all of its provisions). And, if we work with a broader canvas still, say – the

whole topography of statutory law – an essential truth about our jurisprudence reveals itself. Often, but not always, Congress tells us what provisions may and may not be waived through its use of mandatory and permissive language. See Generally, 3 Sutherland, Statutory Construction, (5th Ed. 1992), §§ 57.01-57.05, pp. 1-19; *Public Citizen v. Dept. of Justice, supra*, 491 U.S. at p. 469 (conc. opn., J. Kennedy) ("Reluctance to working with the basic meaning of words in a normal manner undermines the legal process."); Cf. *Fogerty v. Fantasy, Inc.*, ___ U.S. ___; 62 U.S.L.W. 4153, 4158 (1993) ("The word 'may' clearly connotes discretion."). A permissive statute contemplates or implies a waiver; a mandatory provision does not. See, *United States v. Olano*, ___ U.S. ___; 113 S.Ct. 1770, 1778 (1993) ("Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but it is not required to do so. The language of the Rule ('may be noticed'), the nature of forfeiture, and the established appellate practice that Congress intended to continue, all point to this conclusion.")

This focus on legislation points up a basic fact; ours is a system of statutes. Through Congress, and ultimately only through Congress, procedural and substantive laws are enacted. Cf. *Texas Ind. Inc. v. Radcliff Materials*, 451 U.S. 630, 640-641 (1980); *Mistretta v. United States*, 488 U.S. 361, 368, n. 14 (1988) ("rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch"); *Youngstown, supra*, 343 U.S. at p. 589 ("The Founders of this Nation entrusted lawmaking power to the Congress alone . . . "). To make this system work, the

laws – procedural or substantive – must be observed, not ignored. This "rule of law" holds true for the Justice Department as it does for any individual or entity. Cf. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). And, by necessary implication, the laws cannot be circumvented by ingenious agreement of the parties, here through a concocted "waiver" agreement. e.g., *United States v. Goodapple, supra*, 958 F.2d at pp. 1408-1409 ("proffer agreements"); compare, *United States v. Olano*, ___ U.S. ___; 113 S.Ct. 1770, 1782 (1993) (con. opn, J. Kennedy) ("Indeed, there are good reasons to suppose that Federal Rule of Criminal Procedure 24(c) is the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be *varied by a court with or without the consent of the parties.*", italics added).

Stated simply, litigants may never *properly* waive the mandatory language of any statute, assuming the terms are given mandatory effect.[15] It may well be that such a waiver amounts to harmless error, see, *United States v. Montalvo-Murillo, supra*, 495 U.S. at pp. 718-720, 722, but it is nonetheless error. Fed.R.Crim.P. 11(h) ("Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."); compare, *United States v. Olano, supra*, 113 S.Ct. at p. 1777 (1993) ("Because the right to trial is waivable, and because the

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[15] The Majority Opinion below correctly observed that Congress intended the language of The Rules to have mandatory effect: "No one argues that Congress did not mean what it said." Appendix, 5a.

defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error.' ").

Let us consider the two examples offered in the dissenting opinion. Chief Judge Wallace notes that statutory rights, such as the right to appeal a sentence, *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990), and the right to bring civil rights actions, *Newton, supra*, 480 U.S. 386, are waivable. Appendix, 11a. But as to the first example, the Dissent fails to mention that the controlling statute is framed in permissive language.[16] With respect to a waiver of a civil rights action under 42 U.S.C. § 1983, Congress gave no directive or guidance. Thus, in successfully obtaining waivers in *Navarro-Botello* and in *Newton*, the government operated within the given statutory framework.

The same cannot be said here. The Justice Department's waiver policy collides head-on with Congress' clear mandatory directive.[17] Compare, *United States v.*

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[16] See, 18 U.S.C. § 3742(a) (sentences: "A defendant *may* file a notice of appeal . . . ") (italics added); Fed.R.App.P. 3(a) (convictions: "An appeal *permitted* by law as of right . . . ") (italics added).

[17] Indeed, the purpose and mandatory language of The Rules strongly suggest that the trial court lacks the power to give effect to any waiver of the plea-bargain provisions. Cf. *United States v. Kington*, 875 F.2d 1091, 1107-1108 (5th Cir. 1989) ("Both the legislative history of the Speedy Trial Act and the Advisory Committee's guidelines to administration of the Act appear to reflect a policy that might restrict the ability of trial courts to grant effective continuances in the guise of waivers").

While the amendment of Rule 11(h) overruled the per se rule of reversal under *McCarthy v. United States, supra*, 394 U.S. 459, nevertheless, Congress never intended Rule 11(h) to

Willis, supra, 958 F.2d at p. 63 (government may not seek waiver of Speedy Trial Act's mandatory terms). When private parties attempt to override the Congressional will through waivers, it becomes a question of statutory interpretation and public policy. *Infra*, pp. 5-6. When the Justice Department attempts to do the same, it becomes a question of statutory interpretation, public policy and separation of powers. Cf. *Youngstown, supra*, 343 U.S. at pp. 589-592.

This brings us to the last of the government's arguments. The Justice Department maintains, as does Chief Judge Wallace, that since all constitutional rights are waivable, *Edwards v. Arizona*, 451 U.S. 477, 489 (1980) (conc. opn. J. Powell), the plea-statement rules should be as well. Pet. Cert. p. 7; Appendix 10a-12a. But this conclusion rests upon a faulty analogy. Statutes do not always behave like constitutional provisions, nor is there any reason that they should. In a word, statutes are not mere "shadows"[18] of the Constitution; they have their own nature. But see, *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989); *United States v. Dortch, supra*, 5 F.3d at pp. 1068-1069.

The contrary assumption, in fact, has the dim residue of the Supremacy doctrine. To be sure, under the Supremacy Clause, a constitutional right takes precedence over a

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remove the trial court's mandatory obligations under Rule 11. See, 18 U.S.C.A. Rule 11, p. 363.

[18] See, W. T. Jones, 1 History of Western Philosophy, "The Classical Mind," pp. 124-146 (2d ed. 1970), on Plato's Republic.

statute, assuming the two conflict. Thus, under a Supremacy Clause analysis, statutes may do no more, and usually less, than constitutional provisions. See, *Marbury v. Madison, supra*, 5 U.S. at p. 176. But, supremacy is not in issue here. Rather, the question is whether a statute is, on its own terms, waivable. Hence, this case boils down to a matter of interpretation.

The Constitution has been interpreted to permit waivers of all constitutional rights, although the applicable standard for each may vary. See, *Schneckloth, et al. v. Bustamonte*, 412 U.S. 218, 235-246 (1972). As observed by the present Court of Appeals, reading a waiver into this and similar statutes is a more complicated matter:

> "To equate the waiver of these rules with that of an asserted constitutional protection is a false equality. Judicially created waivers of the latter are the result of an inescapable feature of courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. *Given the precision with which these rules are generally phrased, the comparative recentness of their promulgation, and the relative ease with which they are amended, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule.*"

Appendix, 9a, italics added.

The Court of Appeals' studied comparison between The Rules and analogous constitutional rights frames a more basic distinction between statutory and constitutional jurisprudence. Because constitutional provisions

are not easily amended, like statutes, they are given a more flexible construction. Cf. *Marbury v. Madison, supra*, 5 U.S. at p. 176 ("The constitution is either a superior paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it."); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518 (1989); see, 15 Univ.Ch.L.R. 501, 545 (1948) ("In the absence of some mechanism for achieving an authoritative determination, neither the literal meaning nor the intention of the framers [of the Constitution] can be decisive.").

III

THE GOVERNMENT'S WAIVER RULE LENDS ITSELF TO PROSECUTORIAL VOUCHING.

Vouching is a species of prosecutorial misconduct. Cf. *Berger v. United States*, 295 U.S. 78 (1934). It may occur at any time during trial, *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985), and often assumes several different forms. Cf. *United States v. Young*, 470 U.S. 1, 18-19 (1984). But in all cases, the prosecution, in some way, has used the prestige of his Office to influence the jury's verdict. *Ibid.* It is this singular fact which makes vouching an absolutely prohibitive practice.

When a prosecutor takes the witness stand, the dangers of vouching are all too apparent. See, *United States v. Birdman*, 602 F.2d 547, 551-555 (3d Cir. 1979); *United States v. Prantil*, 764 F.2d 548, 552-554 (9th Cir. 1985). "The advocate-witness rule," as it is called, "prohibits an attorney from appearing as both a witness and an advocate in

the same litigation." *Prantil, supra,* at pp. 552-553. To allow otherwise would be to unfairly place the prestige of the United States Attorney's Office behind the testimony of a federal prosecutor. See, *United States v. Johnston,* 690 F.2d 638, 644 (7th Cir. 1982) (en banc). In a broad sense, then, this rule shares the same rationale found in the plea-statement rules – the promotion of fair procedures in the criminal justice system. *Ibid.*

Except in the most unusual cases, the advocate-witness rule bars an Assistant United States Attorney from testifying in the same case he is prosecuting. The rule, however, goes further by discouraging the testimony of prosecutors who were, in some way, involved in the investigation of the case. See, *United States v. West,* 680 F.2d 652, 654 (9th Cir. 1982) ("although testimony by a United States Attorney should not be encouraged, such persons are not disqualified as witnesses in cases in which they play no other role"); see, *United States v. McKoy,* 771 F.2d 1207, 1211 (9th Cir. 1985) (former prosecutor's testimony prohibited); *United States v. Marcello,* 731 F.2d 1354, 1358 (9th Cir. 1984).

Given the force of the rule, the United States Attorney's Office must do all that it can to avoid the rule's proscriptions. *United States v. Prantil, supra,* 764 F.2d at p. 553. The Justice Department's waiver policy does just the opposite. This is shown by the operation of The Rules itself. To come within their protections, the plea-statement rules require the presence of a government attorney. See, Fed.R.Crim.P. 11(e)(6)(D) ("any statement made in the course of plea discussions with *an attorney for the government* . . . ", italics added).[19] This means that, in every case involving The Rules, a prosecutor will be a percipient witness to, and most likely, a participant in, the plea-discussion. Thus, built into the government's waiver policy is an inherent vouching problem. In all trials following a plea-discussion, the testimony of an Assistant United States Attorney will be highly relevant.[20] See, *United States v. West, supra,* 680 F.2d at p. 654 ("although testimony by a United States Attorney should not be encouraged, such persons are not disqualified as witnesses in cases in which they play no other role").

In this case, for example, the prosecuting attorney was also a participant in the plea-discussion. As part of his trial strategy, the prosecutor used the fact of his involvement in the plea-discussion to great advantage. During cross-examination of the defendant, and during

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[19] This requirement of The Rules distinguishes plea-discussions from other interrogative encounters. For example, *Miranda* questioning typically involves police agents, not Assistant United States Attorneys. See, Notes of Conference Committee (1979 Amendment), reprinted in 18 U.S.C.A. Rule 11, p. 356 ("It thus protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions.")

[20] The prohibition of the advocate-witness rule applies to proceedings before a judge and a jury. See, *United States v. Johnston, supra,* 690 F.2d at p. 644. Thus, a defendant may challenge the alleged voluntariness of his waiver of The Rules. If so, the district court will most likely be required to judge the credibility of the prosecutor's testimony against that of the defendant's and possibly defense counsel's testimony. See, *Jackson v. Denno,* 378 U.S. 368, 381-382, 391-392 (1963) (judge must reach issue of voluntariness of confession).

direct-examination of the investigating DEA agent, (one of two agents present during the plea-discussion), the prosecutor repeatedly asked questions requiring the witnesses to refer to his presence at the meeting, and what he said there. [RT 290-292, 294-295, 321-326, 365-367.] By controlling their testimony in this manner, the prosecutor effectively employed the witnesses as his mouthpiece. See, *United States v. McKoy, supra*, 771 F.2d at p. 1211 (vouching when prosecutor speaks to the jury as a witness). Through this subtle yet effective method, the prosecutor brought the prestige of the United States Attorney's Office to bear on the jury's verdict.

What is more, the government obstructed the defense from eliciting relevant testimony from the prosecutor. Specifically, the defense attempted to call the prosecutor to the stand, since he was a witness and participant to what was purportedly said and heard at the plea-discussion. But the district court barred the prosecutor's testimony. [RT 323-324].

The result was an absolute perversion of the advocate-witness rule. As explained by the Court of Appeals in *United States v. Prantil, supra*, 764 F.2d at p. 554, "The advocate-witness rule is aimed at protecting the integrity of the fact-finding process, not at distorting the process itself." On this, the court further noted, "Surely the reasoning behind the advocate-witness rule does not contemplate that a material witness will be able to exempt himself from the rigours of the fact-finding process by electing to proceed as an advocate." *Ibid*; *United States v. Johnston, supra*, 690 F.2d at p. 645 ("The apparent balance achieved by excluding both the defendant's testimony

about the telephone conversation and [the federal prosecutor's] anticipated impeaching response served only to immunize some of the relevant facts from being considered in the decisional process. . . . ").

All told, the prosecutor set the stage for vouching through the government's waiver rule, exploited it to full effect during examination and summation[21], and finessed the advocate-witness rule by not having to testify at trial. The result of this impressive strategy was, in the words of the district court, "one of the quickest jurys I have ever had . . . " RT 472. The government's waiver rule may be an important "weapon" in the "prosecutor's arsenal,"[22] but, at least in this case, it was no aid to the fair administration of criminal justice. Fed. R. Evid. 102.

CONCLUSION

Without question, the Justice Department must enjoy broad powers to ferret out and punish the criminals of our society. And doubtless, the government's waiver rule is a powerful "weapon" for prosecuting criminal defendants. But the Justice Department, like all of us, must operate within the framework of the law – within our system of statutes. Because if not, what kind of example would the Justice Department be setting, an example made by an agency of the Executive branch charged with

[21] See, RT 451-452 (prosecutor refers to his presence at plea-discussion meeting during closing argument).

[22] Pet. Cert., p. 13.

the responsibility "to take Care the Laws be faithfully executed."

For the foregoing reasons, the government's petition should be denied, or in the alternative, granted on all issues framed in this Opposition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 29 1994
OFFICE OF THE CLERK

No. 93-1340

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. The question in this case is whether a defendant and his attorney may agree to waive the rules that make evidence of plea discussions inadmissible, so as to permit the government to impeach the defendant if his later trial testimony is inconsistent with his statements during the plea discussions. Respondent does not dispute our submission that the Ninth Circuit's decision adopting a per se rule of nonwaivability conflicts with the decisions of other circuits on the same question. See *United States* v. *Dortch*, 5 F.3d 1056 (7th Cir. 1993), petition for cert. pending *sub nom. Suess* v. *United States*, No. 93-7218 (filed Dec. 20, 1993). See also *United States* v. *Perrone*, 936 F.2d 1403, 1412, clarified on other grounds on reh'g, 949 F.2d 36 (2d Cir. 1991); *United States* v. *Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991). Nor

does respondent dispute our submission that agreements like the proffer agreement invalidated by the Ninth Circuit in this case are widely used by federal prosecutors throughout the country, and that their validity is therefore a question of great importance to the administration of justice in the federal courts. For those reasons, the decision of the Ninth Circuit clearly warrants this Court's attention.

2. Respondent devotes the bulk of his brief to the proposition that the legislative history of the rules shows that Congress intended that evidence of plea discussions be inadmissible even for impeachment, Br. in Opp. 2-8, and that to contravene that congressional policy would violate separation of powers principles. *Id.* at 12-25. Those contentions, however, are irrelevant to our submission. We do not contend that Rule 11(e)(6), Fed. R. Crim. P., and Rule 410, Fed. R. Evid., themselves authorize the use of respondent's statements for purposes of impeachment, apart from his agreement. We contend only that neither those rules, nor any other rule, forbids the application in this context of the same principles of waiver and forfeiture that are routinely applied to other provisions of the rules.

This Court has recognized that "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). That principle is reflected in the federal rules, which contemplate that a defendant who fails to interpose a contemporaneous and specific objection to a ruling generally forfeits his right

to challenge that ruling on appeal. See Fed. R. Evid. 103(a)(1); Fed. R. Crim. P. 51.

Respondent appears to suggest that the decision of the court of appeals is not inconsistent with that settled principle, because the court recognized that the same right it found nonwaivable could be forfeited if the defendant's attorney failed to object at trial. See Br. in Opp. 2 n.1; Pet. App. 10a n.4. But neither respondent nor the court of appeals has explained why it is sensible to believe that Congress intended to allow forfeiture, but to forbid waiver. Under the Ninth Circuit's analysis, a defendant whose attorney fails to object under Rules 11(e)(6) and 410 to the admission of evidence of plea discussions forfeits any right to claim on appeal that the rules were violated, unless he can shoulder the significant burden of demonstrating a miscarriage of justice amounting to plain error. See *United States* v. *Olano*, 113 S. Ct. at 1779-1781. That is so even though the defendant is not aware of the legal consequences of his counsel's inaction, and even though counsel may not even have realized that there were possible grounds for objection. Yet, under the court of appeals' rule, a defendant is not permitted to agree expressly to the introduction of the same evidence, even when, as here, he has done so knowingly and intelligently after consulting with his counsel. No precedent of this Court supports such an anomalous doctrine.

3. Respondent also contends (Br. in Opp. 21-23) that the nonwaivability rule adopted by the Ninth Circuit is supported by the "mandatory" character of the rules. That contention would have force if the rules were "mandatory" in the sense of expressly providing that their waiver is not permitted. But that is not what Rules 11(e)(6) and 410 say. The rules do not speak to the issue of waiver at all, and thus they are "mandatory"

only in the sense that they preclude certain conduct by the government *in the absence of the defendant's agreement*. As Chief Judge Wallace correctly recognized (Pet. App. 11a-12a), Rules 11(e)(6) and 410 are no more "mandatory" than the rule providing that the right of the people to be secure against unreasonable searches and seizures "shall not be violated," U.S. Const. Amend. IV; or the rule that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. Amend. V.*

4. Respondent also claims (Br. in Opp. 8-12) that he should not be held to his agreement, because that agreement violates the public policy in favor of plea bargaining. There is no public policy, however, that mandates whatever might encourage plea bargaining, irrespective of the cost. The cost that respondent's regime would impose on the criminal justice system—enabling a defendant to present tailored, perjurious defenses insulated from effective challenge—outweighs any risk of chilling a defendant's good faith desire to engage in honest bargaining. In addition, respondent's assessment of the relevant public policy considerations overlooks the fact that

* Adopting the reasoning of the court of appeals, respondent also contends (Br. in Opp. 24-25), that the general rule that permits a defendant to waive even the most fundamental rights has no applicability here, because that general rule has been developed by this Court in the course of defining the scope of the underlying rights. That argument confuses the nature of the right at issue with its waivability. A knowing and intelligent guilty plea, for example, is commonly understood to give rise to a lawful conviction. But the Court has never suggested that that is so because the plea may be viewed as the "trial by an impartial jury" that the Sixth Amendment guarantees. Instead, the Court has recognized that a valid plea is a knowing and intentional relinquishment of the defendant's right to have his guilt determined by a jury—*i.e.*, a waiver. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969).

bargaining is a two-sided process. Because the Ninth Circuit's rule of nonwaivability makes plea discussions significantly less attractive to the prosecution, it is far from clear that that rule will increase the number of dispositions without trial.

5. Finally, respondent contends (Br. in Opp. 25-29) that the Ninth Circuit's per se rule of nonwaivability is justified because the rule prevents the prosecutor from "vouching"—*i.e.*, acting as an unsworn witness and thereby improperly bolstering the credibility of the government's case. As respondent acknowledges, however, "vouching" is a form of prosecutorial misconduct that a defendant can always raise as a ground for relief. Because that conduct is independently redressable when it actually occurs, the mere possibility that it may occur does not justify the broad per se rule adopted by the court of appeals. Here, the court of appeals did not purport to find any improper vouching by the prosecutor, and even if respondent wishes to pursue such a claim on remand, that would not counsel against review of the question actually decided by the Ninth Circuit.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1994

Supreme Court, U.S.
FILED
MAY 26 1994
OFFICE OF THE CLERK

No. 93-1340

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES, PETITIONER

v.

GARY MEZZANATTO, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 22, 1994
CERTIORARI GRANTED APRIL 18, 1994

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
November 1990 Grand Jury

Criminal Case No. 910739GT

UNITED STATES OF AMERICA, PLAINTIFF

v.

GARY CRAIG MEZZANATTO, DEFENDANT

INDICTMENT

Title 21, U.S.C., Sec. 841(a)(1)—Possession of Methamphetamine with Intent to Distribute

The grand jury charges:

On or about August 1, 1991, within the Southern District of California, defendant GARY CRAIG MEZZANATTO did knowingly and intentionally possess, with intent to distribute, approximately 454 grams (approximately one pound) of methamphetamine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

DATED: August 14, 1991.

A TRUE BILL:

_____

Foreperson

WILLIAM BRANIFF
United States Attorney

By: _____

SHANE P. HARRIGAN
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 910739GT

UNITED STATES OF AMERICA, PLAINTIFF

v.

GARY CRAIG MEZZANATTO, DEFENDANT

DOCKET ENTRIES

8/2/91	1	COMPLAINT Gary Craig Mezzanatto (1) Magistrate Barry T. Moscowitz. Possession of a controlled substance with intent to distribute. (methamphetamine) [3:91-m-3096] (ls) [Entry date 08/07/91]
8/2/91	2	Minutes: Enter Order by Magistrate Barry T. Moscowitz first appearance of Gary Craig Mezzanatto on complaint Attorney Merle N. Schneidewind present; S/A Sara Rapport, preliminary exam 8/15/91 at 9:00am Porter, $100,000 c/cs and nebbia hrg and conds; order filed. set for Gary Craig Mezzanatto (cc: all counsel) Court Reporter: BTM91-303:2773-3061 [3:91-m-3096] (ls) [Entry date 08/07/91]

8/2/91	3	CJA Form 20 Copy 4 (Appointment of Counsel) by Magistrate Barry T. Moscowitz [3:91-m-3096] (ls) [Entry date 08/07/91]
8/14/91	4	INDICTMENT by USA Shane P. Harrigan. Counts filed against Gary Craig Mezzanatto (1) count(s) 1 (cs) [Entry date 08/27/91]
8/15/91	5	Minutes: Enter Order by Magistrate Louisa S. Porter dft Gary Craig Mezzanatto arraigned; not guilty plea entered; Atty David Molinari S/A present;, Motion/Trial setting set for 8/26/91 at 9:00am befo (cc: all counsel) Court Reporter: Tape NO. 91-30-1523-1605 (cs) [Entry date 08/27/91]
8/19/91	6	Minutes: Enter Order by Judge Gordon Thompson Jr. in-court hearing held, pretrial motions set for 10/7/91 at 2:00pm., trial set for 10/22/91 at 9:00am (cc: all counsel) Court Reporter: Ann Butcher (cs) [Entry date 08/27/91]
9/4/91	7	Minutes: Enter Order by Magistrate Barry T. Moscowitz, $100,000 P/S plus TD and co-signature of wife and conditions set for deft. Ordered sealed. Leticia Mezzanatto – C/S/T. Defts motion to modify bond-Granted (cc: all counsel) Court Reporter: BTM91-319:3506-3386 (cs) [Entry date 09/13/91]

9/5/91	8	BOND ($100,000 signed by deft & sureties in the amt of $135,000. t/w Advice of Penalties and Sanctions. Copies of TD of Gary Craig and Leticia Mezzanatto. Issd abst to USM) by Gary Craig Mazzanatto (cs) [Entry date 09/13/91]
9/17/91	9	MOTION for disclosure of identity of govt informant by defendant Gary Craig Mezzanatto, for preservation and production of investigator or informant notes and in position of evidentiary sanctions based upon the disclosure of surveillance evidence, and for discovery of exculpatory evidence (Brady) and inspection (cs) [Entry date 09/23/91]
9/17/91	10	MEMORANDUM by defendant Gary Craig Mezzanatto in support of [9-1], of (9-2], of [9-3], [9-4] (cs) [Entry date 09/23/91]
9/18/91	–	Received ORIGINAL TD of Gary Craig and Leticia Mezzanatto for 12158 La Cadena Drive, Colton, CA 92324 in the amt of $100,000. TD given to financial. (cs) [Entry date 09/24/91]
9/30/91	11	MEMORANDUM by plaintiff USA in opposition to [9-1], to [9-2], to [9-3], to [9-4] t/w statement of facts (cs) [Entry date 10/01/91]
9/30/91	11	MOTION for reciprocal discovery by USA as to Gary Craig Mezzanatto (cs) [Entry date 10/01/91]

10/7/91	12	Minutes: Enter Order by Judge Gordon Thompson Jr. granting motion for reciprocal discovery by USA as to Gary Craig Mezzanatto [11-1], granting motion for disclosure of identity of govt informant by defendant Gary Craig Mezzanatto [9-1], granting motion for preservation and production of investigator or informant notes and imposition of evidentiary sanctions based upon the destruction of any investigator or informant notes [9-2], granting motion for disclosure of surveillance evidence [9-3], granting motion for discovery of exculpatory evidence (Brady) and inspection [9-4]; Jury trial date of 10/22/91 confirmed (cc: all counsel) Court reporter: Ann Butcher (cs) [Entry date 10/09/91]
10/7/91	13	Minutes: Enter Order by Judge Gordon Thompson Jr. (cc: all counsel) (cs) [Entry date 10/09/91]
10/21/91	14	TRIAL Memorandum by plaintiff USA (cs) [Entry date 10/22/91]
10/22/91	15	Minutes: Enter Order by Judge Gordon Thompson Jr. preliminary exam vacated pretrial motions vacated trial set for 12/17/91 at 9:00am; Merel Schneidewind relieved (cc: all counsel) Court Reporter: Ann Butcher (cs) [Entry date 10/23/91]

10/22/91	16	Ex parte application for order shortening time for filing of motion to substitute counsel and continue trial; Declaration of Richard C. Chier. (cs) [Entry date 10/23/91]
10/22/91	17	MOTION for appointment of counsel by defendant Gary Craig Mezzanatto t/w Ps & As (cs) [Entry date 10/23/91]
10/22/91	18	ORDER by Judge Gordon Thompson Jr. granting motion for appointment of counsel by defendant Gary Craig Mezzanatto [17-1 Richard C. Chier (cc: all counsel) (cs)] [Entry date 10/23/91]
10/22/91	18	ORDER by Judge Gordon Thompson Jr. withdrawing attorney Merle N. Schneidewind for Gary Craig Mezzanatto and substituting attorney Richard C. Chier (cc: all counsel) (cs) [Entry date 10/23/91]
10/22/91	19	Minutes: Enter Order by Judge Gordon Thompson Jr. (cc: all counsel) (cs) [Entry date 10/23/91]
10/24/91	20	SEALED document by defendant Gary Craig Mezzanatto (Minute order/ Bench warrant) (cs) [Entry date 10/25/91]
11/20/91	21	MOTION to substitute attorney by defendant Gary Craig Mezzanatto, for order continuing trial, t/w p's and a's (gj) [Entry date 11/26/91]

11/20/91	21	ORDER by Judge Gordon Thompson Jr. granting motion to substitute attorney by defendant Gary Craig Mezzanatto [21-1], granting motion for order continuing trial, t/w p's and a's [21-2] (cc: all counsel) (gj) [Entry date 11/26/91]
12/13/91	22	PROPOSED Voir Dire by plaintiff USA (cs) [Entry date 12/24/91]
12/13/91	23	Requested Jury Instructions by plaintiff USA (cs) [Entry date 12/24/91]
12/17/91	24	Minutes: Enter Order by Judge Gordon Thompson Jr. case reassigned to to Judge Earl B. Gilliam (cc: all counsel) (cs) [Entry date 12/26/91]
12/17/91	25	Minutes: Enter Order by Judge Earl B. Gilliam 1st Day-jury impaneled, voir dire begins, Swore witnessed, filed exhibits; trial cont to 12/18/91 at 9:00am (cc: all counsel) Court Reporter: Lee Ann Pence (cs) [Entry date 12/26/91]
12/18/91	25	Oral motion for judgment of acquittal by defendant Gary Craig Mezzanatto (cs) [Entry date 12/27/91]

12/18/91	25	Minutes: 2nd Day—Enter Order by Judge Earl B. Gilliam denying motion for judgment of acquittal by defendant Gary Craig Mezzanatto [25-1]; Juror #3 excused & alt Juror #1 seated as Juror #3. Swore witnesses, filed exhibits Trial cont to 12/19/91 at 9:00am; (cc: all counsel) Court Reporter: (cs) [Entry date 01/03/92]
12/19/91	25	Minutes: Enter Order by Judge Earl B. Gilliam 3rd Day—trial held, Jury retires at 3:10pm and returns at 3:50pm. Ordered meals at govt expense while deliberating. (cc: all counsel) Court reporter: Lee Ann Pence (cs) [Entry date 01/03/92]
12/19/91	26	Requested Jury Instructions by defendant Gary Craig Mezzanatto (cs) [Entry date 01/03/92]
12/19/91	27	Minutes: Enter Order finding Gary Craig Mezzanatto guilty Gary Craig Mezzanatto (1) count(s) 1 (cc: all counsel) Court Reporter: Lee Ann Pence (cs) [Entry date 01/03/92]
12/19/91	25	Minutes: Enter Order by Judge Earl B. Gilliam Ref to P/O & sentencing hearing set for 2/24/92 at 9:00am (cc: all counsel) Court Reporter: Lee Ann Pence (cs) [Entry date 01/93/92]

2/24/92	28	Minutes: Enter Order by Judge Earl B. Gilliam sentencing hearing cont to 3/9/92 at 9:00am (cc: all counsel) Court reporter: Pat Strobel (cs) [Entry date 03/18/92]
3/9/92	29	OBJECTIONS to Presentence Report; & Declaration by defendant Gary Craig Mezzanatto (cs) [Entry date 04/08/92]
3/9/92	30	Minutes: Enter Order by Judge Earl B. Gilliam sentencing hearing cont to 3/11/92 at 1:30pm (cc: all counsel) Court Reporter: Lee Ann Pence (cs) [Entry date 04/08/92]
3/9/92	31	MOTION for new trial by Gary Craig Mezzanatto (cs) [Entry date 04/08/92]
3/9/92	32	MEMORANDUM by defendant Gary Craig Mezzanatto in support of [31-1] (cs) [Entry date 04/08/92]
3/11/92	33	Minutes: Enter Order by Judge Earl B. Gilliam sentencing hearing cont to 3/30/92 at 9:00am (cc: all counsel) Court Reporter: Pat Strobel (cs) [Entry date 04/08/92]
3/16/92	34	MOTION for new trial by Gary Craig Mezzanatto (cs) [Entry date 04/08/92]
3/16/92	35	MEMORANDUM by defendant Gary Craig Mezzanatto in support of [34-1] (cs) [Entry date 04/08/92]

3/16/92	36	OBJECTIONS to Presentence Report; Declaration by defendant Gary Craig Mezzanatto (cs) [Entry date 04/08/92]
3/23/92	39	RESPONSE by plaintiff USA to [36-1], to [29-1] (cs) [Entry date 04/23/92]
3/26/92	40	Motion for order shortening time by Judge Earl B. Gilliam (cc: all counsel) (cs) [Entry date 04/23/92]
3/26/92	41	RESPONSE and opposition to deft's motion for a new trial by plaintiff USA (cs) [Entry date 04/23/92]
3/30/92	37	Minutes: Enter Order by Judge Earl B. Gilliam denying motion for new trial by Gary Craig Mezzanatto [34-1], denying motion for new trial by Gary Craig Mezzanatto [31-1] sentencing hearing held;, sentencing Gary Craig Mezzanatto (1) count(s) 1. Count 1-Custody of BOP for imprisonment for a period of 170 months. Supervised release for term of 5 years. No fine imposed. Assessment $50.00 to be paid immediately., case terminated (cc: all counsel) Court Reporter: Lee Ann Pence (cs) [Entry date 04/08/21]

3/30/92	38	JUDGMENT and Commitment issued to U.S. Marshal for Gary Craig Mezzanatto by Judge B. Gilliam. Entered 4/8/92. (cs) [Entry date 04/08/92]
4/7/92	42	Minutes: Enter Order by Magistrate Roger C. McKee withdrawing attorney Richard C Chier for Gary Craig Mezzanatto and substituting attorney Mark Lippman (cc: all councel) (jm) [Entry date 04/28/92]
4/7/92	43	FINANCIAL AFFIDAVIT by defendant Gary C. Mezzanatto of Gary Craig Mezzanatto (jm) [Entry date 04/28/92]
4/7/92	44	CJA Form 20 Copy 4 (Appointment of Counsel) by Magistrate Roger C. McKee appointing Mark Lippman (jm) [Entry date 04/28/92]
4/8/92	46	Notice of Appeal by defendant Gary Craig Mezzanatto from Dist. Court decision entered 4/8/92; Receipt No/Amt of Fee: ifp [38-1](cc: all counsel) (jm) [Entry date 05/01/92]
4/8/92	–	Docket Modification (Utility Event) (jm) [Entry date 05/01/92]
4/13/92	45	TRANSCRIPT order form for dates 8/2/91; 8/15/91; 10/17/91; 10/18/91; 10/19/91 and 2/24/92 [45-1] (jm) [Entry date 08/27/91]

4/21/92	–	Received Order for appeal time schedule from USCA (jm) [Entry date 05/01/92]
4/21/92	–	Record on Appeal sent to Circuit Court (jm) [Entry date 05/01/92]
4/24/92	47	TRANSCRIPT order from 10/7/91, 10/22/91, 12/17/91, 12/18/91, 12/19/91, 2/24/92, 3/9/92, 3/11/92, 2/30/92 [46-1] (cs) [Entry date 05/15/92]
5/12/92	–	Notification by Circuit Court of Appellate Docket Number 92-50261 (cs) [Entry date 05/13/92]
5/18/92	–	Reporter's Transcript of proceedings for the following court date of 10/22/91 – JURY TRIAL taken in San Diego before Judge Thompson by Ann Butcher (cs) [Entry date 05/20/92]
6/12/92	–	Reporter's Transcript of proceedings for the following date(s): 10/7/91 (Motion Hrg) taken in San Diego before Judge Thompson (Re: [46-1]) (cs) [Entry date 06/17/92]
6/12/92	–	Reporter's Transcript of proceedings for the following date(s): 12/17/91 (Trial-First Day) taken in San Diego before Judge Gilliam (Re: [46-1]) (cs) [Entry date 06/17/92]

6/12/92	–	Reporter's Transcript of proceedings for the following date(s): 12/18/91 (Trial-Second Day) taken in San Diego before Judge Gilliam (Re: [46-1]) (cs) [Entry date 06/17/92]
6/12/92	–	Reporter's Transcript of proceedings for the following date(s): 12/19/91 (Trial-Third Day) taken in San Diego before Judge Gilliam (Re: [46-1]) (cs) [Entry date 06/17/92]
6/12/92	–	Reporter's Transcript of proceedings for the following date(s): 2/24/92, 3/9/92, 3/30/92 (Motions & sentencing) taken in San Diego before Judge Gilliam (Re: [46-1]) (cs) [Entry date 06/17/92]
6/12/92	–	Reporter's Transcript of proceedings for the following date(s): 3/11/92 taken in San Diego before Judge Gilliam by T. Pat Strobel (Re: [46-1] (cs) [Entry date 06/17/92]
12/18/92	48	Minutes: Enter Order by Judge Earl B. Gilliam On courts own motion – Bond Exonerated for Gary Craig Mezzanatto (sh) [Entry date 12/21/91]
1/26/93	–	Record on Appeal sent Circuit Court (sh) [Entry date 01/27/93]
1/26/93	–	Mailed Original Clerk's record on appeal to USCA, Reporter's transcripts in one set of seven volumes only (sh) [Entry date 01/27/93]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 910739GT

UNITED STATES OF AMERICA, PLAINTIFF

v.

GARY CRAIG MEZZANATTO, DEFENDANT

[Excerpts from Trial Transcript pp. 258-380]

[258] THE COURT: Folks, now you have heard the prosecution side of the case, they have now rested. And now we turn to the defense.

Mr. Mezzanatto, state your full name and spell your last name, sir.

THE WITNESS: My name is Gary Mezzanatto, Gary Craig Mezzanatto, M-E-double Z-A-N-A-T-T-O.

DIRECT EXAMINATION

BY MR. CHIER:

Q. Mr. Mezzanatto, How old are you, sir?

A. 40 years old.

Q. And what is your business or occupation?

A. I am an electrician, work for the Santa Fe Railroad.

Q. Are you presently employed by anybody?

A. At this time I am laid off.

Q. And in August of 1991, were you actively employed or were you in some other status?

A. I was still on layoff status, yes.

Q. What is your martial status, sir?

A. Right now my wife and I are in a reconciliation aspect of our marriage.

Q. Do you have any children with your wife?

A. Yes, I do, I have three. Tyler, my oldest, is 14; Brandon, my middle son, is 12; Chelsea is my youngest daughter, she is 7.

[259] Q. Now, have you had any—have you served in the military, Mr. Mezzanatto?

A. Yes, I have.

Q. And when have you served and where have you served?

A. When, in the years between 1970 and '73 active duty, and from '73 to '78 as a naval reserves.

Q. Where were you on active duty, sir?

A. I was stationed here in San Diego. I served two overseas tours of duty for nine months at a time.

Q. Where?

A. And I served in the Vietnam War, and I received combat awards—Vietnam service medals. Actually I have five of them.

Q. Where have you lived the past 30, 35 years?

A. I lived my whole life in the Inland Empire, which is the San Bernardino area. I lived in Fontana, went to school at Fontana High. Got married, moved to Colton. And about that third year—I shouldn't say the third year—yeah, about the third year, my oldest son was six months old when we moved to Colton.

Q. What was the extent of your education?

A. High school graduate.

Q. And have you gone to any kind of trade school? Or how did you learn your trade?

A. I was employed at Kaiser Steel, which was the largest [260] steel mill on west coast, when I got out of the service in '73. And I was employed with them for nine and a half years. And I was electrician's helper for that time.

Kaiser Steel, as you know, is now defunct in terms of steel mills, and I got me a job at the Santa Fe Railroad in San Bernardino from that time after. I was hired in 1981. I think my – I think Kaiser's layoff date was like '79. I was on call, they were like phasing it out.

Q. Mr. Mezzanatto, let me try to keep your answers somewhat responsive to the questions, if you would. We have to proceed by the question-and-answer method.

In August – let's direct your attention – let me ask you this. Prior to August 1991, had you ever been arrested before?

MR. HARRIGAN: Objection. Irrelevant.

THE COURT: Sustained.

BY MR. CHIER:

Q. Have you ever been convicted of a felony, Mr. Mezzanatto?

MR. CHIER: Objection. Irrelevant, your honor.

THE COURT: Sustained.

MR. HARRIGAN: I ask Mr. Chier not to go into this area. He knows it is wholly irrelevant to the issues in this case.

THE COURT: He knows that.

[261] MR. CHIER: His good character?

THE COURT: He can't testify to that. That is not character evidence. That is self-serving, that is not relevant here.

MR. CHIER: Okay.

BY MR. CHIER:

Q. Mr. Mezzanatto, do you know an individual named Gordon Shuster?

A. Yes, I do.

Q. Do you know when you met the person named Gordon Shuster?

A. Pardon me?

Q. When did you meet him, sir?

A. It was early March of this year, my first encounter with Gordon.

Q. Do you remember how you met him?

A. Yes, I do.

Q. Can you tell us how?

A. Mutual friend of ours. I was with him when he went to visit Gordon, and they were – I was just with another person that knew Gordon.

Q. Now, in August of 1991, let me understand what your situation was vis-a-vis your family. Were you living with your family or not with your family, or what was happening?

A. At that time I was just – I was still separated, yes.

[262] Q. And was the person, the mutual friend, some single person that you ran around with at that time?

A. Yes.

Q. And where did your wife and children live in August 1991?

A. At the Colton address, 12158 South La Cadena Drive.

Q. Was that the address that was on the package that was received into evidence in this case?

A. Yes, sir, it was.

Q. Now, where were you living at that time?

A. I was living—at that particular time I was living with this friend of mine that—I was just partaking into moving into another residence.

Q. Do I understand that your meeting, your first meeting, of Gordon Shuster took place at his—

A. Yes.

Q. —House or what is it, trailer?

A. At his house.

MR. HARRIGAN: Objection. Leading.

THE WITNESS: His residence.

THE COURT: Overruled at this point. That is not too out of the way.

Why don't you wait for him to ask the question before you start to answer. It will be more intelligible for everyone. Let him finish, then you answer.

[263] BY MR. CHIER:

Q. Where did you actually meet Mr. Shuster for the first time?

A. At his residence.

Q. What did his residence consist of?

A. A trailer on a piece of property that was unbeknown to me how big it was because it was at dark at the time.

Q. Did you have occasion to see Mr. Shuster a second time after the initial meeting?

A. Yes.

Q. How did that happen?

A. This mutual friend of ours said that Gordon needed some electrical work done, he didn't have any power, they were on a generator supply for power. And he was going to have the Edison Company install some electric on

the property, and he wanted to know if I could do some electrical work.

Q. So did you visit the location with a view toward establishing some sort of business relationship?

MR. HARRIGAN: Objection. Leading.

THE COURT: Sustained.

BY MR. CHIER:

Q. Did you make some attempt to do business with Mr. Shuster?

A. Yes, I did.

Q. And did you do business with Mr. Shuster?

[264] Q. Yes, I did.

Q. Did you develop some kind of a relationship with Mr. Shuster?

A. Yes, I did.

Q. Could you describe for the jury the relationship that you developed with Mr. Shuster?

A. Basically, Gordon was an individual that was an interesting character. He wanted some work done that interested me, because I was unemployed. I went down to research the project he had entailed me to do, but he didn't have the power, so it wasn't—he was going to move a trailer or mobile home on this property, and he wanted me to like set up the power supply for him, which I am fully capable of doing.

Q. And did these business dealings with Mr. Shuster lead to some sort of personal relationship between the two of you?

A. Yes, it did.

Q. And did you then visit with Mr. Shuster on some other basis, other than business?

A. Yes, I did. We became friends and I was welcomed on his property at any time. And I actually became a handyman of sorts for him, because the electrical end, there was nothing for me to do, the power wasn't there. So I was entailed to do other jobs, cleaning up, fixing equipment. He had tractors, heavy-duty equipment.

[265] Q. Now, were you making any money as a result of doing these odd jobs for Mr. Shuster?

A. Yes, I was.

Q. How much were you making?

A. Gordon paid me $100 a day for me to go down there, up to 300 a week.

Q. Was this at a time when you had no regular employment of any kind?

A. Yes, it was.

Q. What was your understanding as to what Mr. Shuster was doing for a living at that time?

A. He was—he told me he was a shipbuilder.

Q. Did you ever see any evidence of his building ships?

A. Yes. He took me to a place in San Marcos that had like a 70-foot boat that he was building. And his property he had a warehouse, what I call a warehouse, it was more like a garage, six or seven garage with just one door on it, really a building, that he had a number of tools and woodworking apparatuses, planes, and things. And he had like big pieces of lumber that he used to patch this boat up—or make this boat with, I should say.

MR. HARRIGAN: Objection, your Honor. We are getting into a narrative. I would like to keep it to a response.

THE COURT: That answer will stand. Let's have the [266] next question.

We will try not to have you answer in the narrative because we want a question and an answer.

THE WITNESS: Yes, your Honor.

BY MR. CHIER:

Q. Now, as time moved on, did you continue seeing Mr. Shuster?

A. Yes, I did.

Q. And did you get kind of friendly with him on a personal level?

A. Yes, I did.

Q. Did he ever reveal to you that he had some other type of employment beside the shipbuilding or boat building?

A. Yes, he did.

Q. What was revealed to you in that regard?

A. He told me that he was a special agent for the CIA and he made plastic explosives. And that him and the owner of the property were involved in this operation.

Q. The owner of which property?

A. The property that Gordon was living on.

Q. This is the Rainbow Canyon or Rainbow, California property?

A. The residence is in Rainbow.

Q. All right. Now, when he told you that about himself, did you believe him?

[267] A. Yes, I did.

Q. Why did you believe him? What was believable about him in that regard?

A. Because all around the yard there are containers of certain types of chemicals and whatnot that he told me that is what it was for.

Q. What about him personally made him believable as a person who would be a CIA agent, in your mind?

A. He was a real knowledgeable individual. He was real convincing. He was intellectual. He was interesting. I enjoyed listening to him. He has a lot of stories to tell about different things in the world that he had done.

Q. Had you ever seen plastic explosives before?

A. No, sir, I hadn't.

Q. Do you know if you have ever seen them?

A. No, sir.

Q. Did you ever become concerned that if there were plastic explosives on the premises that it might be risky to yourself?

A. Yes.

Q. Did you may any inquiry about this?

A. I asked him if any, like, I didn't want to get blown up, because there was things all over around the yard there. He said not to worry because if you kept them separate there was no danger.

[268] Q. Did Mr. Shuster have other projects that he was working on besides boat building and plastic explosive making?

A. Yes. He was – yes.

Q. Wait for the next question, Mr. Mezzanatto.

Did he have other business type projects?

A. Yes, he did.

Q. Did he ever get you to invest in any of them?

A. Yes, he did.

Q. As I understand it, you were an unemployed electrician at this time, right?

A. Yes.

Q. Where would you get money to invest in anything?

A. From savings that I had.

Q. How much money did you invest with Mr. Shuster?

A. I invested up to $3,000.

Q. And what type of investment did you make with Mr. Shuster?

A. It was a gold recycling from the ocean water.

Q. What did he tell you about the nature of this process that caused you to invest in it?

A. He actually told me there was a 3-to-1 return on the money. Guaranteed.

Q. What was supposed to happen as a result of this process?

MR. HARRIGAN: I object to his leading, your Honor.

THE COURT: That one happened not to be leading, the [269] others have been. Watch your leading. What was supposed to happen was not leading, and that is the question pending.

What was supposed to happen?

THE WITNESS: In the business aspect? I am not understanding the question.

BY MR. CHIER:

Q. I take it that he said there was some process that –

A. Oh, yes.

MR. HARRIGAN: Objection. That is leading.

THE COURT: That is leading.

What happened in the process, is that what you want to ask him?

BY MR. CHIER:

Q. What can you explain –

A. Okay. You want me to explain the gold situation. What I was told actually what happened was that his

father had government leases on Camp Pendleton—

MR. HARRIGAN: Object. Not being responsive.

THE COURT: Sorry about that, you don't have standing on that, that is his. Relevancy is your objection.

MR. HARRIGAN: I object to relevancy.

THE COURT: Is that the response you want from him?

MR. CHIER: No, your Honor.

THE COURT: You want to object to it?

MR. HARRIGAN: I object as to relevancy all along, [270] your Honor. We are going a little far afield.

THE COURT: It may sound like it. Let's have another question.

THE WITNESS: Excuse me, but I am lost here.

THE COURT: You don't have to worry about it. All you have to do is just think about the question, and you come up with the answer if you know the answer. It is an answer, yes, or no, or I don't know, so you have four options.

He is going to ask you a question. Just listen to what he says, what he asks you, and just answer it.

BY MR. CHIER:

Q. What type of venture was described to you that got you to put your own money into it?

A. That he had a process that he could reclaim gold from the ocean through carbon—he explained it that he could get carbon and make it magnetized into gold.

MR. HARRIGAN: Object. Relevancy again, your Honor.

THE COURT: It is kind of interesting, but I would like to see counsel over here just a moment. If that was the process he explained to him.

(Whereupon, the following proceedings were had at the bench, outside the hearing of the jury:)

THE COURT: That is not why I called you over here, if the guy said he could fly to the moon that is permissible. That is how gullible he might be, you are entitled to do [271] that.

The biggest problem I have, I have a wife that is helping him testify. He starts to talk, she does this; (demonstrating) positive answer, she does this (demonstrating).

MR. CHIER: I guess she is trying to help me more than him.

THE COURT: Well, I can't have her doing that.

MR. CHIER: How do we handle this?

THE COURT: I am going to exclude her. I will caution her this time, but if she continues we are going to put her out.

MR. CHIER: I will have a word with her.

THE COURT: Yes. Tell her, take her outside and tell her I can't have her helping.

MR. CHIER: I didn't see it.

THE COURT: Of course. That is why I have the position where I get to look a[illegible]nd the whole courtroom.

MR. HARRIGAN: Are we going to go much further? I don't see the relevance.

THE COURT: What is your offer of proof?

MR. CHIER: This all goes to state of mind. He trusted this man, Gordon Shuster, implicitly. I explained and I told the jury he was gullible, that he was easily misled, and that if Gordon Shuster—

[272] THE COURT: We are going to recess this trial and I am going into that ocean, see if I can find that gold.

(Laughter)

MR. CHIER: These are things that actually happened.

MR. HARRIGAN: It doesn't go to his state of mind of whether he knew that was methamphetamine or not.

MR. CHIER: I have to set the stage.

THE COURT: What else are you going to put in, he believed in him so much he was willing to invest the money and go and carry the drugs?

MR. CHIER: He was given a package on the day before the arrest by Mr. Shuster, who obviously was concerned about his situation that was developing at the ranch there.

THE COURT: What other factors, other than the fact he could help reclaim gold from the ocean, do you have to show he is gullible? And he invested $3,000. That is it?

MR. CHIER: The fact he told him about the explosive making and the CIA.

THE COURT: So you are done with it?

MR. CHIER: Yes.

THE COURT: I won't have any more that shows gullibility. Take a moment and talk to her and tell her I won't have it. I will have to have her leave the courtroom.

(Whereupon, the following proceedings were had in open court, in the hearing of the jury:)

[273] THE COURT: Why don't you folks step into the jury room for a moment, please. We will have you back in just one minute.

(Whereupon, the following proceedings were had in open court, outside the hearing of the jury:)

THE COURT: Mrs. Mezzanatto, there is no if or and about it, there is no halfway ground. If you are going to stay in court you are going to have to maintain composure, without a smile, without this, without this. So there is no ifs and ands about it. If you want to stay in, then don't do those things as you sit there.

That is all I have to say about it. So you don't have to explain anything? Okay?

Now, Mr. McDonald, get the jury back.

THE CLERK: Yes, sir, your honor.

THE COURT: Do you have word on your witnesses?

MR. CHIER: I have the proof of service. According to Mr. Sweet, who is a licensed operative for Mr. Lopez's office, they called him early this morning and said they were having problems with the road because of the rain.

THE COURT: I can certainly appreciate that.

MR. CHIER: They claim they are on their way.

THE COURT: Okay. We will get them for the afternoon session. They should make it here.

The only alternative is to ask you to leave the [274] courtroom, and I don't want to do that. This is your husband, you are entitled to stay.

MRS. MEZZANATTO: I will sit on my hands, because this was not directed at him.

THE COURT: Well—

MRS. MEZZANATTO: I understand, and I will sit on my hands.

THE COURT: Okay.

(Whereupon, the following proceedings were had in open court, in the hearing of the jury:)

THE COURT: We are all together again now. Everyone is present.

BY MR. CHIER:

Q. Let me ask you this, Mr. Mezzanatto. Did you ever get any paperwork or any kind of receipt or anything for the money you invested with Mr. Shuster?

A. No, I didn't.

MR. HARRIGAN: Objection. Leading.

THE COURT: Overruled.

BY MR. CHIER:

Q. Did you ever?

A. No.

Q. Now let me take you to the day before you were

arrested. Do you remember what day you were arrested on?

A. Yes, sir, I do.

[275] Q. Was that August 1st?

A. Yes.

Q. Let's go to the day before August 1st, July 31st. Did you have occasion to be at Mr. Shuster's house on that day?

A. Yes, I did.

Q. What kind of car were you driving?

A. I was driving the black Camaro, with "Mr Nini" license plates.

Q. With "Mr Nini" license plates?

A. Personalized yes.

Q. Who was that registered to?

A. Fred DeLarosa.

Q. Was that somebody you knew?

A. I knew his son.

Q. What was the name of the son?

A. Steve DeLarosa.

Q. What brought you to Mr. Shuster's house on the day before the arrest?

A. Gordon had paged me to come down and help him out on some more aspects of moving.

Q. And what time of day did you go to his house, Mr. Mezzanatto?

A. Roughly about 10:30, 11:00, in the noon hour. It varied.

Q. Can you describe for the jury what happened, what was [276] said, and how people were acting when you went to Mr. Shuster's house on the day before the arrest.

A. On the day before the arrest when I went down there, Gordon was nervous, kind of like. He wasn't Gordon. He was somebody that had some things on his mind. And he told me that things didn't seem right, things were

fishy or whatever around there, that the neighbor had become nosey in his business of making explosives.

Q. And did he ask you to do anything? Did he give you anything?

A. Yes, he did.

Q. Can you tell us about that?

A. He gave me that brown mailer that is in evidence. It was sealed, stapled together. And he told me to hang onto it.

Q. Until when?

A. Until he called for it.

Q. Was there any writing on there at the time he gave it to you?

A. No, there wasn't.

Q. Did you put any writing on there?

A. Yes, I did.

Q. Why did you put writing on that package?

A. Because he said, "Put an address on there."

Q. Did you have a pager on August 1st, 1991?

[277] A. Yes, I did.

Q. Did you have a pager when you met Mr. Shuster in March of 1991?

A. No, I didn't.

Q. And could you tell us the circumstances under which you invested in a pager?

A. Yes. Gordon used to call me on the phone, I have an answering service. But in the courses of my life outside of Gordon, I had other jobs that I would do, I would do other side jobs, or I just wouldn't be home. So when he would call, he would want me to respond when he would call. When I get home and answer the messages, I would call him back.

He would say, "Why don't you buy a pager?" He said, "Every time I try to get ahold of you, you are missing out on money."

It made sense to me, so I purchased a pager.

Q. You said "answering service."

A. Telephone recorder.

Q. You mean an answering machine?

A. Exactly.

Q. Now, how long would you say that you spent at Mr. Shuster's on the day before August 1st?

A. In terms of visits or how long before the day of August 1st?

Q. How long were you at his place?

[278] A. Oh, his place. That particular day I was there probably a couple of hours.

Q. Now, let me move on to the following day, August 1st, 1991. Did you have some prearranged plans for that day that were totally independent of anything between you and Mr. Shuster?

A. Yes, I did.

Q. What were those plans?

A. My second to oldest son was playing in the Little League Allstars and they were in the sectionals at that particular time of the tournament that Southern California has. I had planned to go to his Allstar game that night.

Q. From what time of day to what time of day were your plans for being with your children, your son?

A. During the game, and it is usually about two hours before we have to travel to the site, it takes an hour, the coach likes them to be there an hour before the game to go through the pregame warmups and whatnot.

It is usually about an hour after the game we stand around and talk about it or head on home—maybe not an hour, maybe half an hour, 45 minutes. Everybody leaves and goes home.

Q. At about 2:30 on the 1st of August, did you receive any kind of a communication from Mr. Shuster?

A. Yes, I did.

[279] Q. What happened?

A. He paged me and wanted to know if I could bring the package back to him.

Q. Let's take this one step at a time. He paged you by calling your little pager?

A. Yes.

Q. And, by the way, what name did you acquire the pager in?

A. I bought it under my name.

Q. And what address did you give them?

A. I gave them my apartment address where I was living at the time.

Q. Did you subsequently ever change that?

A. Yes, I did.

Q. Why did you?

A. Gordon insisted on it. When he found out that I had bought a pager under my name, he didn't think it was real nice that I had something that could trace my connection with him with it. It wasn't—

Q. Mr. Mezzanatto, so did you change the registration of this pager?

A. Yes, I did.

Q. How did you do that?

A. I wrote the company I bought it from and gave them a fictitious name that I sold it to.

Q. Did you give them a fictitious address as well?

[280] A. No, I didn't

Q. What kind of address did they end up with?

A. They ended up with the the address where I was living at that I had moved to, after I left the apartment.

Q. Now, when Mr. Shuster paged you on the 1st of August, did you return the call?

A. Yes, I did.

Q. Did you return it quickly or at leisure?

A. At leisure.

Q. When you returned the call, did you speak to Mr. Shuster?

A. Yes, I did.

Q. Can you tell us what was said by each of you, if you remember it?

A. Yeah. He wanted to know like what I was doing and if I could come down and visit him.

Q. What did you tell him?

A. I explained to him that we had an Allstar game that day and my kids and I were going to be – in the late afternoon, and I couldn't, with the time span of travel, couldn't come down to see him.

Q. Is that how you left it?

A. At that particular time, yes.

Q. All right. Were there additional pages later in the day?

[281] A. Yes, there was.

Q. One or more than one?

A. More than one. Five or six. A number of them.

Q. Did you answer all of them, any of them, or none of them?

A. I answered most of them. There was a span where during the course of the game I didn't answer them, no.

Q. Was he making any particular request of you when you would return the call?

A. Yes, he wanted me to come down and there would be something in it for me.

Q. Did he ask you to bring anything?

A. Yes, he asked me to bring the package he gave me the day before.

Q. Did you continue to tell him you were not able to do it because of your commitment to your children?

A. Yes. I told him that I would see what I could do,

but I couldn't do it at that time. If you allow me to deliver it –

Q. Wait until I ask a question. I am sorry. I am trying not to lead and trying not –

A. Yeah, I sense something here.

Q. At some point during the course of these pages and these conversations you were having, did Mr. Shuster make you an offer, so to speak, that you couldn't refuse?

[282] MR. HARRIGAN: Objection. Leading, Your Honor.

THE COURT: He can answer that yes or no. It is not leading.

Did he make an offer you couldn't refuse? Yes, or no?

THE WITNESS: Yes, he did.

BY MR. CHIER:

Q. Tell us what happened in that regard.

THE COURT: What was the offer, now.

BY MR. CHIER:

Q. Yes.

A. He offered me 13 big ones, which to me would be $1300.

Q. To do what?

A. To bring that package to him. All of a sudden there became an urgency of this package. And I asked, "Why don't you come and get it?"

Q. What did he say?

A. He said he couldn't come and get it, I had to bring it to him. That he had somebody that was interested in the contents of that package.

Q. Yes.

A. And in the respect to that, I told him I would have to wait until after my son's baseball game.

Q. Did you ever ask him what was in the package?

A. I asked him what it was, but he told me I didn't need to [283] know.

Q. When did you ask him that?

A. When he gave it to me the day before.

Q. Did you have any reason to believe it contained narcotics?

A. No, I did not.

Q. Now, when the ante was up to $1300, so to speak, did you make some arrangement to accommodate Mr. Shuster?

A. Yes, I did.

Q. Tell us what happened.

A. I called him and told him that I had the package and that I would bring it to him.

Q. Did you get instructions from him as to where to go?

A. Yes. He said that they would be at the Rainbow Oaks Cafe. Then later on he got another page, they told me they wouldn't be there no more, they were going to get something to eat with the client of his that was going to be at the Sizzler. My instructions was to go to the Sizzler, but I didn't know where the Sizzler was.

Q. Did you lie to Mr. Shuster in terms of what time you said you could meet him?

A. I won't say it was a lie, no. I didn't arrive when I thought I could get there, no.

Q. Did you leave yourself enough time to get there when you said you would be there?

[284] A. No.

Q. Why was that? Did you have something else to do?

A. Yes, I was at my son's baseball game.

Q. Did you ultimately get to the area where you understood you were to meet Mr. Shuster?

A. Yes, I did.

Q. And do you know what time it was when you arrived?

A. I arrived roughly at 10:00, 10:15.

Q. And did you see Mr. Shuster at some point?

A. Yes, I did.

Q. And was he alone or with someone?

A. He was with somebody.

Q. And can you tell us what happened?

A. I was going to the phone to call him because he wasn't where he said he was going to be. So in terms of that, I walked up, they drove up.

Q. Who is "they"?

A. Gordon and Tristan.

Q. Tristan Moreland?

A. Yes, the officer that was here yesterday.

Q. What happened after that, Mr. Mezzanatto?

A. Gordon was all happy to see me. Everything was, "Oh, man, I'm glad you made it. Glad you made it. How are you doing? What took you so long?"

Q. Can I interject a question here?

[285] A. Yes, sir.

Q. In all the time you have known Mr. Shuster, had he ever seemed that elated to see you on any prior occasion?

A. No, he did not.

Q. Never?

A. No, sir.

Q. All right. Continue, please.

A. So I had the package in my car, and he asked me if I brought the stuff and I said yes.

And I says, "You want me to give it to you here?"

He said, "No, let's do it in your car."

This was Agent Moreland telling me this now, because I was just going to give him the package. This individual I never met before, I didn't know who he was. He was

Gordon's friend as far as I was concerned. Gordon told me it was his friend.

And for this to be coming down to him when the 13 big ones is—because Gordon didn't think I was—

MR. HARRIGAN: Objection. There is no question pending.

THE COURT: Sustained. It is getting narrative now.

Next question.

BY MR. CHIER:

Q. Mr. Mezzanatto, what ultimately happened with this package in the car, and what was said by whom?

[286] A. Well, Gordon was happy to see me.

Q. You don't have to go back to that, just tell us what happened.

A. What was ultimately said was that I could come into my car, "Yeah, I will come and see it in your car."

Gordon actually said, "Let's get out and check it out."

This guy, I didn't know him, I agreed to come into my car.

Q. And what happened in your car?

A. I was clearing off the seat for Mr. Moreland to sit down in.

Q. What was on the seat?

A. Like my jacket and a newspaper. Just car trash, I call that. Clutter. I was putting it in the back seat.

Q. And was there any conversation between Mr. Moreland and Mr. Shuster?

A. At that particular time of getting into the car, I don't recall, no.

Q. Tell us to the best of your recollection, Mr. Mezzanatto, exactly who said what and did what from that point forward.

A. Okay. I am sitting in the car in the driver's side, Tristan is sitting in the passenger's seat with the door

open, and Gordon is kneeling right there next to him.

I don't know this Tristan individual. Gordon and him [287] are talking, and Tristan states, "Stuff looks real good and clean."

Q. Who did he say that to?

A. I thought he was talking to Gordon, not myself. And I am smoking a cigarette. And I go to put it out in the ashtray, and I hear this clinking. I pick it up, and it was that pipe.

Q. That glass pipe?

A. Yes, the one that is right there.

Q. Is that your pipe?

A. Personal pipe, no. But I will accept responsibility for it being in my car.

Q. Well, did anybody—did Mr. Moreland appear to notice it when you picked up the pipe?

A. No.

Q. Did you do or say anything when you picked up the pipe?

A. Yeah, I looked at it and I offered Gordon and Tristan if they wanted a hit. They declined and I just put it back in the ashtray.

Q. Did your reference to the pipe that you picked out of the ashtray have any reference to the package that was transported by you?

MR. HARRIGAN: Objection. Leading, Your Honor.

THE COURT: Sustained.

[288] BY MR. CHIER:

Q. Were you—when you asked them if they wanted a hit, what were you referring to?

A. I was referring to the pipe—the glass pipe, I should say. The glass pipe.

Q. Were you referring to the package in any way?

A. No, I wasn't.

Q. Did you hear Mr. Moreland testify yesterday as to what happened at the parking lot?

A. Did I hear Mr. Moreland what?

Q. Did you hear Mr. Moreland testify about the same incident?

A. Yes, I did.

Q. And was his testimony correct or accurate?

A. It wasn't correct, no.

Q. And in what respects was it either misleading or inaccurate, sir?

A. In respect to where I was trying to get him to test the contents of that package, I was not.

Q. Did you state to anybody at that—on that night that you wanted the money to go get an additional pound of drugs?

A. Well, Tristan started talking to me like—

Q. Sir, listen, did you ever say—

A. No.

Q. —"Give me the money, and I will go get more drugs"?

[289] A. No.

MR. CHIER: I have no further questions, Your Honor.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. HARRIGAN:

Q. Good morning, Mr. Mezzanatto.

A. Morning.

Q. Now, I think you testified on direct that you first met Gordon Schuster approximately six to seven months prior to your arrest, correct?

A. Yes, I did.

Q. And you said you were introduced to Gordon Shuster by a mutual friend; is that right?

A. Yes, I did.

Q. Can you tell the ladies and gentlemen of the jury who that mutual friend was?

A. You want his name?

Q. Yes.

A. Brent Vincent.

Q. And you and Gordon Shuster referred to him as "Uncle Bob;" isn't that correct?

A. Yes.

Q. And you knew Uncle Bob before you knew Gordon Shuster, right?

A. Yes.

[290] Q. How long had you known Uncle Bob?

A. Approximately a year and a half.

Q. And at the time of the arrest, where did Uncle Bob live, do you know?

A. He was a floater. I didn't have a permanent address for him, no.

Q. He just kind of lived from hotel to hotel, correct?

A. I wouldn't say that. I don't know.

Q. You stated you were friends, didn't have a permanent address?

A. I would say that is more correct.

Q. He didn't have any gainful means of employment; isn't that right? Let's say legitimate means of employment; isn't that right?

A. No. He was a glazer.

Q. Isn't it a fact that you knew Uncle Bob, known him for a long time. He was involved in trafficking methamphetamine, Mr. Mezanatto, that is correct, isn't it?

A. No.

Q. Well, now, you recall about a month ago you met with myself, you met with Agent McKee here, you met with Agent Moreland, correct?

A. Yes.

Q. On October 17th, I think was the date, which was a Thursday, right?

[291] A. I think so, yes.

Q. Remember that date?

A. Yes.

Q. Remember it was in the U.S. Attorney's office, which is in the building next here, correct?

A. Yes.

Q. And you came to my office, and you came with your attorney, your then attorney, Merle Schneidewind, right?

A. Yes.

Q. At that time isn't it a fact, sir, that you admitted to me, to your attorney, Agent Moreland, you knew Uncle Bob and Uncle Bob was dealing in methamphetamine?

MR. CHIER: May we approach sidebar, please?

THE COURT: Yes.

(Whereupon, the following proceedings were had at the bench, outside the hearing of the jury:)

MR. HARRIGAN: I think I explained this to you yesterday, he admitted to Agent McKee, to me, he knew he was delivering a pound of methamphetamine that he got from Uncle Bob. Impeachment.

THE COURT: He will deny it?

MR. CHIER: Is counsel going to be a witness?

MR. HARRIGAN: I have other witnesses.

THE COURT: He has other people he can call as a witness, if he denies it.

[292] MR. CHIER: Well—

THE COURT: Out of court declaration.

With reference to leading questions, question, did you have a report or paper work from the investment? That is not leading. The witness can recall of his own recollection. If he asked, you did have or didn't have any paperwork,

then that would be leading. That is suggesting an answer.

MR. HARRIGAN: There was a lot of leading.

THE COURT: That is admissible. Put the witness on rebuttal. I do allow leading, I think it is proper to lead in both areas.

(Whereupon, the following proceedings were had in open court, in the hearing of the jury:)

BY MR. HARRIGAN:

Q. Let me ask you, do you have the question in your mind?

A. Could you repeat it, please?

Q. Isn't it a fact you met with us, you admitted you had known Uncle Bob for a long time?

A. Yes.

Q. We talked about Uncle Bob; isn't that correct? At that meeting?

A. Yes, we did.

Q. And you admitted that Uncle Bob was a friend of yours; isn't that correct?

A. Yes.

[293] Q. And you admitted that you met Gordon Shuster through Uncle Bob; isn't that a fact?

A. Yes.

Q. And that in fact you knew both Uncle Bob and Gordon Shuster were involved in trafficking methamphetamine.

A. At that time, yes, I did.

Q. You admitted that to us?

A. Yes.

Q. And you admitted to us, isn't it true, that you picked up that package of methamphetamine from Uncle Bob that day, on August 1st; isn't that correct? That is what you told Agent McKee, myself, your own attorney; isn't that right?

A. I stated that, yes. And I also stated a few other things.

Q. You did state that. You picked up this package. You didn't tell us that somehow Gordon Shuster provided you with this package the day before, did you? You didn't tell us that at this meeting, correct?

A. No, I didn't.

Q. In fact, you told us that you knew that package contained methamphetamine, didn't you?

A. I told you I found out that package contained methamphetamine, yes.

Q. The question is, you told us you knew at the time that that package contained methamphetamine, didn't you?

[294] A. At what time are we referring to?

Q. At the time you delivered the package.

A. No.

Q. In fact, you said that the methamphetamine was actually Gordon Shuster's and Uncle Bob was holding it, and you just picked up that methamphetamine for Gordon Shuster; isn't that correct?

A. Yes.

Q. In fact, when we asked you about whether you had dealt methamphetamine before you indicated that this is the first time you had ever delivered this large a quantity of methamphetamine; isn't that in fact true?

A. Yes.

Q. You admitted to us that you had dealt in methamphetamine before, didn't you? That you had bought ounce quantities?

A. No.

THE COURT: I am sorry, you spoke so rapidly on that last question.

BY MR. HARRIGAN:

Q. You admitted you bought and sold –

MR. CHIER: I am going to object to the use of the word "admitted." It calls for a conclusion.

THE COURT: That is one he can testify to.

MR. CHIER: Your Honor, it is not the conclusion that is important, it is the words that are used that will [295] determine whether or not –

MR. HARRIGAN: I'll rephrase the question.

THE COURT: It is up to you. If you want me to rule, I will rule; if you want to rephrase, rephrase.

BY MR. HARRIGAN:

Q. Isn't it a fact you told us that you dealt in ounce quantities of methamphetamine on prior occasions? Mr. Mezzanatto, isn't that a fact?

A. I told you that at the debriefing?

Q. At the meeting, yes.

A. No. I told you the largest amount I have ever known to be in transactions were ounces. I didn't tell you I dealt in them, no.

Q. So you never admitted to us you had dealt in methamphetamine before?

THE COURT: You are saying "admitted" again.

BY MR. HARRIGAN:

Q. You never told us that you had dealt in methamphetamine before?

MR. CHIER: It has been asked and answered.

THE COURT: Overruled.

THE WITNESS: Can you repeat the question?

BY MR. HARRIGAN:

Q. Your testimony is today, then, you have never dealt in methamphetamine before; is that right?

[296] A. Correct.

Q. And you never told us that fact, that you dealt in methamphetamine, at – let me rephrase that.

Did you tell us at the meeting that you had dealt in methamphetamine on previous occasions?

A. Prior to August 1st?

Q. Yes.

A. No, I didn't.

Q. Well, prior to August 1st you knew what methamphetamine was, didn't you?

A. I know what methamphetamine is, yes.

Q. You knew what it looked like, didn't you?

A. I could say yes, since it is—yeah, I would say yes.

Q. You did—

A. I have seen methamphetamine, if that is what you are asking.

Q. That is what I am asking. You have seen methamphetamine, you knew what it looked like on August 1st?

A. Yes.

Q. In fact, you had smoked methamphetamine yourself; isn't that correct?

A. I have smoked methamphetamine, yes.

Q. In fact, now, that pipe that was seized from your car, Government's Exhibit 3, that was your pipe, wasn't it?

A. My personal pipe, no.

[297] Q. Whose pipe was that?

A. I don't know.

Q. The first time you saw that in your car was when you heard this clink; is that correct?

A. Yes.

Q. Now, I think you testified on direct that you had developed a business relationship with Gordon Shuster in this six or seven months; is that correct?

A. Business—I was working for Gordon, yes.

Q. You were working. What type of work were you doing for him out there on the property in Fallbrook, California?

A. I was doing a number of things. I was more or less employed to be an electrician, but there was no electrical work to do so I started doing handyman jobs. A lot of time I didn't do anything, we just visited.

Q. What jobs did you do that required your special expertise of being an electrician?

A. I didn't do any.

Q. So he hired you at $100 a day just to do handyman work, not because you were a licensed electrician; is that right?

A. Yeah, but I didn't work every day.

Q. I am not saying you worked every day, but you said when he paid you he paid you $100 a day.

MR. CHIER: Object to the form of the question. He is asking the witness to speculate as to the reason for [298] somebody else doing something. The question was, "So he hired you to do handyman work, even though you were an electrician?"

THE COURT: The witness is here, he can say what he was hired for. Overruled.

MR. CHIER: He can't speak for that hirer, your Honor.

THE COURT: Yes, what his understanding is. He can speak to that. Overruled.

BY MR. HARRIGAN:

Q. Let's go back. You knew what work you were doing out there, didn't you?

A. The physical work, yes.

Q. Physical work. And that physical work didn't require any special expertise as an electrician, correct?

A. No.

Q. In fact, it is fair to say the work you did was a handyman, right?

A. Yes.

Q. Work that required really no special training or skill, correct?

A. Correct.

Q. And for that work Gordon Shuster was willing to pay you, Gary Mezzanatto, $100 a day?

A. Yes, he was, up to $300 a week.

[299] Q. Up to $300 a week. He was willing to pay you – how long did you work in a given day?

A. Sometimes I worked all night.

Q. And sometimes you worked less than that?

A. Sometimes I only worked a couple of hours.

Q. Every time you came down he gave you $100 to come down and work; is that correct?

A. Not physically gave me $100 every time, no.

Q. When you worked a couple of hours, how much did he pay you?

A. It would be like he would run a tab, whatever. I would get $300 a week.

Q. You weren't close to Mr. Shuster's property, were you?

A. No.

Q. And we are talking about an hour-and-a-half- to two-hour drive, aren't we?

A. Yes.

Q. So you would drive down, what would take a four-hour round trip, to do a couple of hours work at Mr. Shuster's residence; is that correct?

A. Yes.

Q. That is the type of business relationship you had developed; is that right?

A. Yes.

Q. There really was no electrical work to be done at Mr. [300] Shuster's property, was there?

A. I never did electrical work at his place, but yes there was electrical work.

Q. It ran on a generator; isn't that correct? The property out there ran on a generator?

A. The property, yes, it did.

Q. Which was fueled by diesel?

A. Yes.

Q. And let me ask you this, you testified also that when you met Gordon Shuster he essentially told you that he was a special agent for the CIA and he made plastic explosives.

MR. CHIER: Misstates the witness. He didn't say that he was told that when he met Mr. Shuster.

MR. HARRIGAN: That is fine.

BY MR. HARRIGAN:

Q. At some point when you met him, did he tell you that?

A. Gordon told me that, yes.

Q. "I work for the CIA"?

A. When I questioned his abilities to –

Q. Answer the question, please. It is a yes-or-no question.

A. Yes.

Q. At some point he told you, "I work for the CIA," right?

A. Yes.

Q. And that he made plastic explosives?

[301] A. Him and the owner made plastic explosives.

Q. Him and the owner made plastic explosives. And you believed him, right?

A. Yes, I did.

Q. And the reason you believed him was because there were all of these chemicals out at this property?

A. There were containers with chemicals in them that he said were chemicals for making plastic explosives, yes.

Q. And because you saw the chemical containers, you also believed he worked for the CIA, right?

A. Yes.

Q. Let's get a picture of this rural property. We are not talking about the Taj Mahal, are we, where Mr. Shuster lives right?

A. By no means.

Q. He lives in what is like a double-wide mobile trailer, right, on property?

A. Yes.

Q. There is no electricity out there, correct? I mean, in terms of electricity from public utilities, correct?

A. No.

Q. The access back to that road is a dirt road?

A. Yes.

Q. It is not maintained by the county, is it?

A. No. They had their own tractor, they maintained it [302] themselves.

Q. And most of these chemicals and equipment that you saw, you were able to see those because those were all around the property; isn't that correct?

A. Yes.

Q. There would be some by his trailer, some off near a shed, correct?

A. Exactly.

Q. A few trailers out there that he would keep locked, right? That he had chemicals in them; isn't that right?

A. I don't know about inside the trailer, no.

Q. I am talking about other trailers, not his house trailer.

A. You say "the shed," I mean reference to the garage. There was a lot of containers up there, yes.

Q. And based solely on the fact that he had the chemicals you believed that, one, he was making explosives; and, two, he worked for the CIA; is that right?

A. Yes.

Q. Now, Gordon Shuster himself never had a pager; isn't that correct?

A. Gordon had a pager.

Q. In his house he had a phone though, correct?

A. Yes, he had a phone.

Q. And you would contact him, generally, by calling his [303] home phone; isn't that right?

A. Correct.

Q. Now, you said after you met him he directed you to obtain a pager; is that right?

A. To a what?

Q. To obtain a paging device.

A. To purchase a pager?

Q. Yes, Gordon told you, "Why don't you get a pager?"

A. Correct.

Q. And the reason you did so was so you wouldn't lose these jobs that Gordon had available for you, correct?

A. Correct.

Q. So he could contact you at any time of the night to come down and do these handyman jobs, correct?

A. No, I never went down there like at night to do handyman jobs.

Q. You never went down there at night, generally he would call you the day before, correct?

A. Yes, he would call me that day.

Q. Or that day. Now, you had an answering machine, though, right, prior to getting a pager?

A. Correct.

Q. And Gordon Shuster was able to contact you on the answering machine and get ahold of you, wasn't he?

A. Yes.

[304] Q. And you weren't aware of any other people that Gordon Shuster was using to do handyman work out on the property, were you?

A. I am sorry?

Q. You weren't aware there were any other individuals that Gordon Shuster was using to do handyman work at the property?

A. Other people?

Q. Yes.

A. At times, yes, there were other people out there.

Q. Now, when he directed you to get the pager, do you remember when you got that pager, what day?

A. The exact date, no.

THE COURT: I'll tell you what, I will give you a couple of hours to think about that.

We are going to take a noon recess right now. I have a meeting with the other judges, so I will be back at 1:45. You can think about the date you got the pager.

Let's take a recess, folks. Enjoy your recess. We will see you at 15 minutes to 2:00. Have a nice lunch hour.

(Lunch recess.)

[305]

* * *

THE COURT: Counsel, want to continue.

MR. HARRIGAN: Thank you.

THE COURT: All parties are present. I hope you folks had a nice lunch.

BY MR. HARRIGAN:

Q. Mr. Mezzanatto, I think where we last left off I was asking you about a telephonic pager that you obtained, remember that?

A. Yes.

Q. In fact, you obtained a pager sometime in April 1991; isn't that correct?

A. Yes.

Q. And you first obtained that pager in your name, Gary Mezzanatto?

A. Yes, I did.

Q. And you used your address, 1226 Bellview Street in San Bernardino?

A. Yes, I did.

Q. And do you recall how much it cost you to obtain that pager?

A. It was a couple hundred dollars, yes.

Q. You spent $200 to obtain that pager, right?

A. That was the cost of it, yes.

[306] Q. And real shortly after you obtained that pager, you then sent a letter to the pager company sometime around the middle of May telling them that you had sold the pager to a John Martinez, correct?

A. Yes.

Q. And that was a lie, wasn't it?

A. Yes, it was.

Q. And, in fact, you put as the address 5702 Ironwood in San Bernardino, California as the address for John Martinez; isn't that right?

A. Yes, it is.

Q. And John Martinex didn't live at that address; isn't that right?

A. Yes, it is.

Q. You were John Martinez, correct?

A. I was – yes.

Q. You were using a false name, right?

A. Yes.

Q. And you asked the company to make changes, note the billing and change of address, right?

A. Yes.

Q. Now, at the time that you were arrested, that same pager was seized from you; isn't that right?

A. Yes, it was.

Q. Now, I think on direct testimony you said the reason you [307] did all of this was because Gordon Shuster told you to; is that right?

A. Yes, it was.

Q. Because he told you it could be traced back to you?

A. Yes, he did.

Q. And you didn't want that to happen; isn't that right?

A. No, Gordon didn't want it to happen.

Q. Isn't it a fact you didn't want it to happen?

MR. CHIER: Argumentative. Asked and answered, your Honor.

THE COURT: Overruled.

BY MR. HARRIGAN:

Q. You were involved in dealing Methamphetamine and you didn't want that pager number to come back to you, Gary Mezzanatto; isn't that a fact?

A. No, it is not.

Q. Well, you were doing this for Gordon Shuster, right? That is what you claim?

A. Pardon me?

Q. You changed the name and the billing on this pager because Gordon Shuster told you to, right?

MR. CHIER: Asked and answered, your Honor.

THE COURT: Overruled. Foundational.

BY MR. HARRIGAN:

Q. Right?

[308] A. Yes.

Q. And you did that because you had a business relationship with Gordon Shuster, right?

A. I did work for Gordon, yes.

Q. And through Gordon you were paid money; isn't that right?

A. Yes.

Q. So you lied to the pager company for financial reasons, right?

MR. CHIER: Argumentative, your Honor.

THE COURT: Overruled—I change my ruling. Sustained.

BY MR. HARRIGAN:

Q. You changed the address and the name on the pager because of financial reasons, correct?

A. No.

MR. CHIER: Objection.

BY MR. HARRIGAN:

Q. You didn't do that for money?

A. No.

Q. You did that simply because Gordon Shuster told you to?

MR. CHIER: Asked and answered again, your Honor.

THE COURT: Overruled.

THE WITNESS: Yes.

[309] BY MR. HARRIGAN:

Q. You weren't concerned with the pager coming back to you, is that what you are saying?

A. Correct.

Q. Because you didn't think anything illegal was going on; is that right?

A. Correct.

Q. Well, isn't it a fact after you were arrested, sir, after you were arrested, after the jig is up, Gordon has been arrested, right?

A. Yes.

Q. You wrote a letter to the pager company, correct?

A. No.

Q. Let me show you what I marked as Government's Exhibit 6 for identification.

(Plaintiff's Exhibit 6 marked for identification.)

MR. HARRIGAN: I have shown defense counsel what I marked as Government's Exhibit 6—I think that is next in order—for identification. Let me identify it for the record. It is simply five pages from a nationwide paging company that include billings, invoices, letters, change of address.

BY MR. HARRIGAN:

Q. Take your time. What I want you to look at, though, as you review all of the documents, look at the last page of [310] that document. Mr. Mezzanatto, do you recognize that letter?

A. No.

Q. Isn't it a fact, sir, that you, or you caused somebody else to write a letter to the pager company after you were arrested saying, "Please cancel my pager, 714-298-6236, as of August 12th, 1991, due to theft. Thank you, Johnny Martinez."

MR. CHIER: Objection. Question is compound and asked and answered.

THE COURT: No, that is a document, he is just asking what it says. Overruled.

MR. CHIER: He said, "you or you caused somebody." That is a compound question.

THE COURT: There is no problem with that question.

THE WITNESS: In answer to your question, you said that I wrote the letter. No, I did not.

BY MR. HARRIGAN:

Q. Did you cause someone else to write that letter?

A. I asked the change be—the service to be canceled on the pager.

Q. Who did you ask to do this?

A. I asked the person that I puchased it from. I didn't ask them verbally, I had somebody else to ask to cancel that, which would be my wife, to call the person to cancel it.

I did not write that letter, she did not write that [311] letter.

Q. Do you have any idea who would send a letter to the pager company which says, "please cancel my pager," same number, "as of August 12th due to theft. Johnny Martinez"?

A. Because that was the name that the pager had been put into. It was previously sold. I fully admit I put the—

Q. Sir, take a look at that exhibit again. That is a signature, correct? That is John Martinez.

A. That is not my signature of John Martinez.

Q. You do not know who—

A. I do not know who wrote that.

THE COURT: Wait until he finishes the question, now.

BY MR. HARRIGAN:

Q. You had no idea who would have sent this letter to the pager company?

A. Personally, no. I did not know who did it.

Q. All you asked your wife to do was just to call the pager company and tell them to cancel it?

A. Yes.

Q. You never told you wife to call them up and say it has been stolen?

A. I didn't—

MR. CHIER: Your Honor, I am going to object to that. Husband-and-wife privilege. He doesn't have to answer [312] that.

THE COURT: Overruled. The question was what he told his wife to do.

MR. CHIER: That is a communication, and that is privileged.

THE COURT: Did he tell his wife to. Overruled.

BY MR. HARRIGAN:

Q. Did you tell you wife that?

A. I told her to get ahold of the company and cancel it.

Q. Did you tell her to tell the company, the question is, that it had been stolen?

Q. No.

A. You are not responsible for this misrepresentation?

A. No.

MR. CHIER: Argumentative. Move to strike.

THE COURT: Overruled.

BY MR. HARRIGAN:

Q. Now, Mr. Chier asked you on direct how you obtained this package here which has been entered into evidence as Government Exhibit 2. Do you recall that?

A. Yes.

Q. I think you testified in court today that when you received that, this package was stapled up and taped?

A. Yes.

Q. And you had no idea what the contents of that package [313] were?

A. No, I did not.

Q. But you believed the package might contain explosives or some type of plastic explosives?

A. Yes, I did. That was my assumption, I was never told that.

Q. That is fine. That was your assumption. No one ever told you that?

A. No.

Q. Gordon Shuster never told you that?

A. No.

Q. He didn't tell you?

A. No.

Q. But you agreed to take this package from him, not knowing what was inside, correct?

A. Yes.

Q. And, according to you, did you testify today that he told you to write an address on it; is that right?

A. Yes, he asked me to address the package.

Q. He didn't tell you whose address to put on it, correct?

A. No, he didn't.

Q. You could have put President Bush's address on there?

A. Yes, I could have.

Q. But you chose, sir, to put as a mailing address—would you like to look at it?

[314] A. I have seen it.

Q. You have seen the package before. You chose to put as a mailing address, "The M & M Family, 12158 South La Cadena Drive, Colton, California."

That was your wife's address at the time, correct?

A. Correct.

Q. It wasn't Gordon Shuster's address?

A. No.

Q. It wasn't Uncle Bob's address?

A. No.

Q. And who is the M & M family? That is not related to the candy, is it?

A. No, Mezzanatto-Mezzanatto family is what I would relate it to.

Q. As a return address you have, "From M & A & Z family, Ironwood, San Bernardino 92404."

What is the M & A & Z family?

A. I don't recollect that to mean anybody.

Q. You never intended to mail this package, did you?

A. No, not directly to anybody, no.

Q. The question is, did you ever intend to mail this package, directly or indirectly, to anybody?

A. No.

Q. But you put stamps on it; is that right? You have some stamps here. Would you like to see the package? Those are [315] four stamps, correct?

A. Correct.

Q. 29 cent stamps?

A. Yes.

Q. Postage has gone up? Did you weigh out this package before you put the stamps on it?

A. No.

Q. You didn't intend to mail it?

A. No, not like that.

Q. Not like that, but did you intend to mail it at all?

A. No.

Q. I assume if this contained explosives, this was going to be delivered to your wife's address; is that right? If it got lost?

MR. CHIER: Your Honor, it is argumentative. He said he didn't intend to mail it.

THE COURT: The last question was argumentative. The area is probative.

BY MR. HARRIGAN:

Q. By doing your action, did you realize that if somehow this package got misplaced it might be sent to your wife's address?

A. Yes.

Q. Now, you testified now that Gordon Shuster caused you to do this, correct?

[316] A. Yes.

Q. But isn't it true, Mr. Mezzanatto, the reason you did this is the reason that you put your pager in another name, it was to conceal what you were doing?

MR. CHIER: Asked and answered, your Honor.

THE COURT: Overruled.

THE WITNESS: No, it wasn't.

BY MR. HARRIGAN:

Q. Because, isn't it a fact, if you are somehow stopped on the way down to Fallbrook, police said, "What is that package." You could say, "It is simply mail." Isn't that right?

A. I never intended to get stopped by the police on the way to Fallbrook, no.

Q. Now, you assumed this was explosives, correct? Contained in this package?

A. Not explosives, an ingredient for.

Q. But you weren't – you didn't know for sure?

A. I had no idea, you are correct.

Q. And you testified on direct that you are not familiar with plastic explosives or explosives; is that right?

A. Correct.

Q. But you are aware that explosives can be flammable, right?

A. Yes.

[317] Q. And that if you get a flame around explosives, you might have an accident; isn't that right?

A. Possibly.

Q. Despite that fact, you offered to have Agent Moreland take a hit from this glass pipe that you found in your car, right?

A. Yes, I offered him.

Q. And right below him, fair to say about a foot below him, or in his lap at that time, is this package that may contain explosives, right?

A. I didn't know what that package contained.

Q. That is right, you didn't know what it contained. But you thought it contained explosives, right?

A. Not as a overbearing assumption of what was in there, no. I had no idea.

Q. Well, you testified on direct that you thought that Gordon Shuster, you believed he was making plastic explosives at his ranch, correct?

A. Yes, that is what he told me.

Q. Now, in addition to offering that pipe, you are also a smoker, aren't you?

A. A cigarette smoker, yes.

Q. On that hour and a half drive down to Fallbrook from San Bernardino, you had some cigarettes in your car, didn't you?

A. Yes, I did.

[318] Q. And you, in fact, smoked quite a few cigarettes; isn't that right? On the way down there.

A. I don't remember the number.

Q. Isn't it a fact when the agents searched your car your ashtray was full of cigarette butts; isn't that right?

A. That—I don't remember that either.

Q. But you do recall having cigarettes and smoking cigarettes in your car, don't you?

A. Yes.

Q. Now, you said that Gordon Shuster offered you 13 big ones to take this package back down to Fallbrook, right?

A. Yes, he—

Q. That is just a yes-or-no question. Did he offer you $1300?

A. He said 13 big ones, to me that meant 1300, yes.

Q. That is fine. And let me ask you this, how many times have you, on previous occasions, delivered packages for Gordon Shuster for $1300?

A. Never.

Q. To you that was a lot of money, correct?

A. Yes, it was.

Q. The most Gordon Shuster paid you before is $100 a day; is that right?

A. Yes.

Q. Now, let's go back to the meeting, October 17th, that I [319] touched on briefly before. Do you recall that meeting with Agent McKee, myself, Agent Moreland, and your attorney, Merle Schneidewind, right?

A. Yes.

Q. And isn't it a fact you came to talk to us because you wanted to cooperate with the government and provide information about other traffickers?

MR. CHIER: Objection. May we approach sidebar, your Honor?

THE COURT: No. We don't need a sidebar for that. Let's have the question over again, please.

MR. CHIER: Discussions as part of a case settlement are by policy excluded from evidence, your Honor.

THE COURT: You weren't involved in that. Was he involved?

MR. HARRIGAN: No, he was not involved.

THE COURT: You weren't involved in that. Overruled. Let's hear the question again. Overruled.

BY MR. HARRIGAN:

Q. Isn't it a fact you talked to us because you told us you could help the government out by providing information about people dealing in drugs, right?

THE COURT: Objection, counsel?

MR. CHIER: Yes. May I approach sidebar, your Honor.

[320] THE COURT: No. Your objection is relevancy? Improper cross?

MR. CHIER: Yes. Relevance, your Honor.
THE COURT: Overruled. You may answer.
THE WITNESS: Repeat the question, please.
THE COURT: Ms. Reporter, please read the question back.
(Record read.)
MR. CHIER: Your Honor, I would cite the court to rule 408.
THE COURT: You keep thinking, don't pay attention to what we are doing.
Overruled.
You may answer.
THE WITNESS: Could I hear the question again?
THE COURT: Yes.
MR. CHIER: I am also going to object on Kastigar grounds, your Honor.
THE COURT: Overruled.
Ms. Reporter.
Everybody stop now so the reporter can read the question.
(Record read.)
THE WITNESS: No. That is not the reason why I talked to them.

[321] BY MR. HARRIGAN:
Q. Isn't it a fact, sir, that at that meeting you told the agents and myself that when you delivered that package you were acting as a courier?
A. I was delivering a package that belonged to somebody else.
Q. It is a yes-or-no question.
MR. CHIER: No, it is not, your Honor. The witness is entitled to explain his answer.
THE COURT: We have to have a yes-or-no answer first. Counsel who is cross-examining has the right to have him answer the question.

Let's start all over again.
MR. HARRIGAN: I will ask it again, your Honor.

BY MR. HARRIGAN:
Q. Isn't it a fact you told the agents and myself at that meeting that when you delivered that package—
THE COURT: Referring to what?

BY MR. HARRIGAN:
Q. Government's Exhibit 2, the envelope that Gordon Shuster had provided you, that you were acting as a courier?
THE COURT: Just a moment. Do you have an objection?
MR. CHIER: Yes, your Honor.
THE COURT: State it, please, for the record.
[322] MR. CHIER: Rule 408. Kastigar.
THE COURT: Overruled.
You may answer.
THE WITNESS: At that meeting, no, I did not.

BY MR. HARRIGAN:
Q. Isn't it a fact that you said you knew it was methamphetamine and you were simply acting as a courier of drugs?
A. No, I did not.
Q. Isn't it a fact that at that meeting you never told me, Agent McKee, Agent Moreland, anything about the CIA or any plastic explosives being manufactured in Fallbrook by Gordon Shuster?
A. I wasn't given the chance.
THE COURT: The answer is no?
THE WITNESS: No.

BY MR. HARRIGAN:
Q. Well, you recall when that meeting started out, don't you, Mr. Mezzanatto, I specifically told you that if

you are going to talk with us you should be truthful, correct?

MR. CHIER: Your Honor, counsel is placing him in a position to be a material witness in the case.

THE COURT: He is entitled to inquire about that conversation. Objection overruled.

THE WITNESS: Could I have the question again, [323] please?

BY MR. HARRIGAN:

Q. At that time in the meeting one of the first things I went over with you was the guidelines of the meeting, correct?

A. Which were?

THE COURT: Talking about the guidelines, we are not getting into what they were.

BY MR. HARRIGAN:

Q. Prior to the meeting, what the parameters were going to be for the meeting; is that correct?

A. Yes, you mentioned something to the effect.

Q. Something to the effect. And I mentioned, correct, in the front of the agents, that you should be 100 percent truthful in talking to myself and the agents; isn't that right?

MR. CHIER: Your Honor, this is entirely improper. Counsel vouching for his own anticipated testimony here.

THE COURT: No, not his anticipated testimony, he is going to have other people testify to that. He can't do it. He has to have other people at the meeting. The objection is overruled.

MR. CHIER: I intend to call Mr. Harrigan as a witness.

THE COURT: You can't call him as a witness. There [324] are other people you can call for him.

Next question.

THE WITNESS: Can you reask the question again, please?

BY MR. HARRIGAN:

Q. Yes. Isn't one of the things I told you in the presence of the agents was if you are going to talk to us you should be truthful?

A. Yes.

Q. You told us you were going to be truthful; isn't that right?

A. Yes.

Q. And you told us you were going to provide us with all information; isn't that right?

A. I would provide you with what?

Q. You agreed to provide us with all information that you had?

A. I would tell you what I knew, yes.

Q. And on more than—you said you weren't given the opportunity to tell the story about the CIA; is that right?

A. No. My questioning arisen from the first question and answer—

Q. Well, no, Mr. Mezzanatto, you will have a chance to explain your answer.

The question is, though, you testified here in court [325] that the government didn't give you the opportunity to tell about this story about the CIA?

MR. CHIER: The record speaks for itself, your Honor.

THE COURT: Overruled.

THE WITNESS: I was not given the opportunity, no.

BY MR. HARRIGAN:

Q. Isn't it a fact that during numerous times in that interview we gave you an opportunity to explain some of your answers, consult in private with your counsel?

MR. CHIER: Calls for a conclusion of the witness.

THE COURT: Overruled.

THE WITNESS: Repeat the question, please.

BY MR. HARRIGAN:

Q. During numerous times during that meeting we stopped the interview and told you to consult with your counsel and think about the answers you were going to give.

A. One time you told me to consult with my counsel, yes.

Q. We did that on more than one occasion, didn't we?

A. No.

Q. And that meeting lasted more than a short period of time; isn't that right?

A. No, that meeting was a very short period of time.

Q. That meeting lasted, isn't that true, at least 40 minutes; isn't that right?

[326] A. I do not know the exact length of the meeting. It was short to me. I spent more time in the hallway—

Q. There is no question pending.

MR. CHIER: He is explaining his answer, your Honor.

THE COURT: He can't explain it. That is what you are here for. The person asking the question is entitled to have that question answered.

BY MR. HARRIGAN:

Q. You didn't mention about the CIA, and you also at no time mentioned anything about plastic explosives; is that correct?

A. At that meeting, no.

Q. In fact, the first time that you told the government about the CIA plastic explosives is right here in court today; isn't that a fact?

A. This is the first chance I had to express that, yes.

Q. The question is, this is the first time you have related that story; isn't that true?

A. Yes.

Q. Isn't it a fact, Mr. Mezzanatto, that you knew all along that—at least knew prior to August 1st—that Gordon Shuster was manufacturing methamphetamine in Fallbrook, California?

A. No, I did not.

Q. Isn't it a fact that at that meeting with Agent McKee [327] and Agent Moreland that you admitted that you knew he was manufacturing methamphetamine?

A. After the arrest I found that out, yes.

Q. That is not the question. Didn't you admit that you knew prior to your arrest?

A. No, I did not admit that.

Q. Isn't the truth that you knew about the methamphetamine lab, and in fact you yourself helped Gordon Shuster obtain chemicals and supplies for that methamphetamine lab?

A. No, I did not.

Q. You never helped—isn't it a fact that you did help Gordon Shuster obtain equipment for that methamphetamine lab?

A. Your definition of equipment is going to be different than mine.

Q. That is fine. Let me ask you—let me show you what I have marked as Government's Exhibit 7 for identification.

(Plaintiff's Exhibit 7 marked for identification.)

MR. CHIER: Your Honor, can we see you at sidebar?

THE COURT: Okay.

(Whereupon, the following proceedings were had at the bench, outside the hearing of the jury:)

MR. CHIER: Counsel proposes to use a document not available to me prior to trial.

THE COURT: What is it?

MR. CHIER: Rule 16. It is a receipt of some kind.

[328] MR. HARRIGAN: I will tell you where it came from, Gordon Shuster. He is not entitled under Rule 16. It is a receipt from Grainger for a vacuum pump. A vacuum pump is used in the manufacture of methamphetamine. This is his address, he signed this.

THE COURT: This is cross-examination.

MR. HARRIGAN: Not introduced into evidence.

MR. CHIER: Here the point is—

THE COURT: He didn't offer it in the case in chief, he is entitled to use it now.

MR. HARRIGAN: It wasn't seized from your client.

MR. CHIER: I don't know where it was seized from.

MR. HARRIGAN: I represent, as an officer of the court, the agents got it from Gordon Shuster.

THE COURT: He is going to ask him. He is entitled to use it for that purpose.

MR. CHIER: He is required under Rule 16 to make that available.

THE COURT: No, didn't use it in his case in chief. Impeachment.

MR. CHIER: Any document.

THE COURT: No.

MR. CHIER: This is not a document that originated with Mr. Mezzanatto.

THE COURT: He is going to ask him.

[329] MR. HARRIGAN: It has a signature.

THE COURT: He is going to ask him. There is no problem with that.

MR. CHIER: No admission as to anything incriminating. If there is it tends to establish an element of the offense, it should have been made available.

THE COURT: Offered as impeachment.

MR. CHIER: As to what?

MR. HARRIGAN: He helped to make a lab out there. He says he doesn't know anything about it. That is why the government is entitled to ask. He may have an explanation.

THE COURT: He is taking a chance putting it in.

MR. CHIER: Fine.

(Whereupon, the following proceedings were had in open court, in the hearing of the jury:)

BY MR. HARRIGAN:

Q. Let me show you what I have marked as Government's Exhibit 7 for identification, and ask you to take a look at that.

A. (Witness complies.)

Q. Tell me when you are done taking a look at that.

THE COURT: The question is, do you know what it is? Just yes or no.

THE WITNESS: Yes, I know it is an invoice.

[330] BY MR. HARRIGAN:

Q. It is an invoice; is that right?

A. Yes, it is.

Q. And it is an invoice from Grainger, which is a company that, I take, makes electronic parts?

A. It is a supplier, warehouse supplier.

Q. This has your signature on it, correct? Gary Mezzanatto.

A. Yes, it does.

Q. And this is an invoice or purchase order dated June 18th of this year, right?

A. Yes, it is.

Q. In which you purchased a vacuum pump from Grainger—or from Bennetts Electrical; is that right?

A. I purchased it under that name, yes. I worked for that individual. Grainger is a wholesaler, the public can't buy from them.

Q. That is right. Bennetts Electrical Company is a retailer?

A. Correct.

Q. And you bought that pump from Bennetts Electrical, correct?

A. No, I bought it from Grainger.

Q. This is a vacuum pump that you purchased, correct? Do you want to take a look at it?

[331] A. I don't see what the purchase order is. No, it is a 1/10—1/10 horsepower piston compressor.

Q. That is a vacuum pump?

A. No, that is a compressor that pumps air.

Q. Would you accept if Grainger had told me—

MR. CHIER: Your Honor, I would object to validating hearsay, would he accept it. It is argumentative.

THE COURT: He can ask him about the receipt.

MR. CHIER: The witness is now being asked to validate the hearsay statement of some vendor, your Honor. That is completely outside the rules of evidence.

THE COURT: No, it is not. Overruled.

You may ask him.

BY MR. HARRIGAN:

Q. If you were told by Grainger that item No. 5Z349 was a vacuum pump, that would be incorrect; is that right?

A. That would—

MR. CHIER: Object on the grounds he is asking the witness to speculate.

THE COURT: Everybody stop. When he trying to object, he is trying to protect your interest, so be quiet for a moment.

Let me hear your objection.

MR. CHIER: The objection is that any question that begins with "if you were told" requires the witness to [332] speculate.

THE COURT: That is not necessarily so.

MR. CHIER: Calls for speculation.

THE COURT: He can answer. Overruled.

BY MR. HARRIGAN:

Q. Let me ask you this, you don't know what item 5Z349 is, do you?

A. I know it as what that paper says it to be, yes.

THE COURT: Either you do or you don't. See how easy it is? "I don't know" or "Yes, I do."

THE WITNESS: Specifically, no.

BY MR. HARRIGAN:

Q. What is a 1/10 piston compressor?

A. You want me to describe what a 1/10 is to me?

Q. Yes.

A. Do you want me to say what Grainger says it is?

Q. What is it to you?

A. 1/10 horsepower compressor. In other words, the horsepower is what generates the speed of your compression.

Q. Isn't it true with a compressor you can use it both to blow air and suck air, right? To act as a vacuum, right?

A. A compressor is to blow air, yes.

Q. And you can create a vacuum by blowing air, isn't that right?

A. I wouldn't know that to be a true fact, no.

[333] Q. You do know, Mr. Mezzanatto—isn't it a fact that you know that this item—you pruchased this specifically for Gordon Shuster to utilize to manufacture methamphetamine; isn't that a fact.

A. That is not a fact.

Q. You never provided Gordon Shuster with this 1/10 piston compressor?

A. I bought that for Gordon Shuster, yes, I did.

Q. Oh, you bought it for Gordon Shuster?

A. But not to manufacture methamphetamine, no.

Q. How did that fit into you handyman work at Fallbrook?

A. That exactly is work I—I live next to a Grainger. In a neighboring Riverside City, there is a Grainger. You noticed that says it is in Pomona.

Q. I understand that. My question is this—

A. I went to Riverside because Gordon asked me if I knew where a Grainger was. I said, "yeah, there was one by my house."

Q. That is fine. But my question to you is you testified you were something of a handyman for Gordon Shuster. Did one of your duties as a handyman entail buying compressors for him?

A. I ran errands for Gordon, yes, I did.

Q. Were you paid cash, $130, for a compessor?

A. Yes, Gordon gave me the money for that.

[334] Q. Gordon gave you the money for that?

A. Yes, he did.

MR. HARRIGAN: May I have one moment, your Honor?

THE COURT: Yes.

BY MR. HARRIGAN:

Q. Now, Mr. Mezzanatto, directing your attention to the night of August 1 when you met with Agent Moreland, according to you you were just delivering a package to Gordon Shuster, correct?

A. Correct.

Q. Isn't it a fact, though, that you asked Agent Moreland to accompany you back up to San Bernardino County to get a pound?

A. Agent Moreland asked me if I could get another pound. I had no idea what he was talking about. Gordon was there with him, Gordon.

Q. You never asked Agent Moreland, "What are you talking about," did you?

A. I wasn't taking the question as it being directed to me, no.

Q. Isn't it a fact, though, that you said, "It will take us about six hours; hour and a half to two hours to drive up, hour and a half to two hours to get the pound, an hour and a half to two hours to get back down to Fallbrook; isn't that true?

[335] A. In the scheme of my time frames that is what it would take me, yes, to travel those distances.

Q. I wasn't asking you how long it would take you, isn't it a fact that is what you told Agent Moreland?

A. When I asked him to accompany me, yes.

Q. You did ask to accompany you?

A. I asked him and Gordon both to accompany me. I didn't know where I was going. They wanted to know how long it took me to get there and back. I told them. I didn't even know where we was going. This is Gordon's deal. I am playing along. I don't even know what is happening.

MR. HARRIGAN: No further questions, your Honor.

THE COURT: Any redirect?

MR. CHIER: Yes, your Honor.

Now, your Honor, may it be understood I am going to ask questions about the October 17th meeting because your Honor allowed it into evidence?

THE COURT: You may ask questions. I will rule on them as they come up.

MR. CHIER: I don't want to be in the position of waiving any objections I might have made by asking these questions.

MR. HARRIGAN: I don't know any objections he made other than relevancy and Kastigar.

MR. CHIER: Rule 408.

[336] THE COURT: You may ask about it.

REDIRECT EXAMINATION

BY MR. CHIER:

Q. Now, directing your attention back to October of 1991, just a couple of months ago, Mr. Mezzanatto, were you represented by another attorney on the 17th of October?

A. Yes, I was.

Q. And were you set to go to trial in this courthouse?

A. Yes. I had a trial date, yes, I did.

Q. And was the trial date close to October 17th?

A. Yes, it was.

Q. And did somebody suggest to you that you have a meeting with government agents?

A. Say—repeat that again.

Q. Was it suggested to you by anybody that you ought to have a meeting with government agents?

A. Yes, it was.

Q. Who suggested that to you?

A. My attorney.

Q. Now, did you spend any time with your then attorney preparing for this meeting?

A. None at all—can I retract that question? Very little if any at all.

Q. You have an estimate as to the amount of time you spent in discussion of the purpose of the meeting?

[337] A. With my attorney, approximately five minute brief.

Q. And was Mr. Harrigan there? Your interrogator earlier?

A. At the meeting, yes, he was. At the meeting with my attorney, no, he wasn't.

Q. I understand. I am speaking of the actual meeting itself, with the government agents.

A. Yes. With the government agents, Mr. Harrigan was, yes.

Q. Were there other government agents there?

A. Yes, there were.

Q. Who were they?

A. Officer John McKee and Tristan Moreland.

Q. Now, did your attorney suggest to you anything about the reason for having such a meeting?

A. Yes, it was to—it was entailed to reduce sentencing.

Q. You heard Mr. Harrigan bring up the matter of guidelines a little earlier?

MR. HARRIGAN: Objection. I wasn't referring to guidelines of sentencing. Guidelines of the meeting, not the guidelines.

THE COURT: Not the guidelines for sentencing, guidelines for the meeting.

MR. HARRIGAN: I object to any inquiry as to sentencing, your Honor.

MR. CHIER: He brought up the meeting, your Honor, and I am entitled to go into the purpose of the meeting, [338] whatever that purpose might be.

THE COURT: The question is proper as long as you state the guidelines of the meeting. That is all he was talking about, he was not talking about the guidelines.

MR. CHIER: I am actually going for the big guidelines.

THE COURT: That wasn't mentioned.

MR. CHIER: It was mentioned to Mr. Mezzanatto by the government agents.

THE COURT: I don't recall that being mentioned by an agent.

MR. HARRIGAN: I did not elicit that on cross.

THE COURT: The only guidelines I am aware of are the guidelines of the meeting.

MR. CHIER: It is not fair to not allow the witness to testify to his part of the meeting, your Honor. All we have now is the government has some meeting.

THE COURT: If you want to go into redirect, you think that affects his testimony, you may do so. I cannot think of how it would possibly affect his testimony. Do you think that affects his ability to testify here?

MR. CHIER: I think he is entitled to go into that if that was part of the purpose of the meeting.

THE COURT: That is not what the meeting was called for. That is not my understanding. You may lay a [339] foundation, "Did he tell you what the maximum punishment was," if you think it is relevant.

BY MR. CHIER:

Q. Was there some discussion, Mr. Mezzanatto, as to how this meeting could help settle your case that was then pending?

A. Yes. My attorney said that the guidelines entailed a five-year minimum mandatory sentence.

MR. HARRIGAN: Your Honor, I would object to any reference to the sentence in this case.

THE COURT: No, if he thinks it is relevant he can get into it, because it is pretty serious. I don't think it is relevant in the case because nobody ever mentioned it, there hasn't been any discussion about it.

MR. CHIER: This was discussed during the meeting, the meeting itself.

BY MR. CHIER:

Q. Mr. Mezzanatto, during the course of the meeting on October 17th, did one of the government agents say something else about the minimum mandatory sentence in the case?

MR. HARRIGAN: Objection. Leading. And that is irrelevant.

THE COURT: Did they say anything about that?

THE WITNESS: The government agent, if Mr. Harrigan is considered a government agent, yes, he did.

[340] THE COURT: He told you what the minimum sentence would be if you were found guilty?

THE WITNESS: He told me that it was—

THE COURT: No, I just asked you if that is what he said. Did he tell you what the minimum sentence would be if you were found guilty, that the court may impose?

THE WITNESS: Yes.

BY MR. CHIER:

Q. What did he tell you?

THE COURT: No, no. Did that affect your decision whether or not you talked with them?

THE WITNESS: Yes, it did.

THE COURT: Was it because of that you decided you didn't want to talk to them?

THE WITNESS: Yes, it was.

THE COURT: He may mention it.

BY MR. CHIER:

Q. What did he tell you about that, Mr. Mezzanatto?

A. He told me that I wasn't looking at a five-year minimum mandatory, he was looking at a ten-year minimum mandatory. And he offered me two years of a reduced sentence for coming in the debriefing if he accepted my answers of what it was that I was supposed to answer of his questions.

BY MR. CHIER:

Q. Did he reserve the—

[341] MR. HARRIGAN: Your Honor, I object to the relevance.

THE COURT: He may go into that. Shows his motive for not going along with it.

Next question.

BY MR. CHIER:

Q. Who reserved the final decision to determine whether they would allow you any time off of your sentence?

THE COURT: If you know.

THE WITNESS: Mr. Harrigan.

THE COURT: How can he do it? I am the judge.

THE WITNESS: Because Judge Thompson told me at the October 27th trial date—

MR. HARRIGAN: I object as to relevance. That is hearsay.

THE WITNESS: —That the government was the only person—

THE COURT: Just a moment.

THE WITNESS: —That could refrain from the sentencing guidelines, the judge had no control over it.

THE COURT: He may have misunderstood. That was not your meeting with Mr. Harrigan, was it?

THE WITNESS: Mr. Harrigan represents the government.

THE COURT: No, what Judge Thompson said. He wasn't [342] at the meeting with Mr. Harrigan, was he? Was Judge Thompson at the meeting with Mr. Harrigan?

THE WITNESS: No, he wasn't.

THE COURT: Anything he said came after the meeting?

THE WITNESS: Yes, that is true.

THE COURT: So that didn't affect your decision not to cooperate, did it?

THE WITNESS: But my attorney—

THE COURT: Wait, wait. That didn't affect your decision to be cooperative, though, did it? What Judge Thompson said. He wasn't at the meeting.

THE WITNESS: What Judge Thompson said, no. Judge Thompson confirmed what was told to me.

BY MR. CHIER:

Q. Mr. Mezzanatto, was it explained to you by Mr. Harrigan how the government had anything to say about the sentence that the court might ultimately give you?

A. Repeat that again?

Q. Yes. Did Mr. Harrigan explain how the government, the federal government, could influence the amount of sentence that you would receive if convicted?

A. Yes, he did.

Q. What did he say in that regard?

A. That he could make recommendations.

Q. Under some provision of law?

[343] A. I assume so, yes.

Q. Now, when you went to this meeting, how would you characterize the mood or atmosphere?

A. Intimidating. Unfriendly.

Q. Where was the meeting?

A. It was in Mr. Harrigan's back office.

Q. Let's just—I am sure these folks don't know what Mr. Harrigan's office is.

Was it in this building or in this complex of buildings?

A. Yes, it was in this building on the other side.

Q. The part that is at a right angle to this part?

A. Exactly.

Q. Who was in the room where this meeting was being held?

A. Mr. Harrigan, Mr. Moreland—Mr. Tristan Moreland—Mr. McKee, Mr. Merle Schneidewind, and myself.

Q. When you went into the room, were there questions put to you, sir?

A. Yes, there were.

Q. By law enforcement or by your own attorney?

A. By law enforcement officers. The one agent, John McKee, is the only one that spoke with me, besides Mr. Harrigan.

Q. Do you remember about how many questions were asked during that meeting?

A. Yes, approximately three.

Q. And do you remember did anybody in that room [344] characterize your answers to the questions?

A. Yes, they did.

Q. And how were your answers characterized, by whom?

A. By Mr. McKee that I was a liar.

Q. And, in fact, had you lied at that time?

A. On one of the questions, yes, I did.

Q. What was the question?

A. Where I picked up the package from.

Q. And what did you say in response to the question as to where you picked up the package from?

A. I told him I picked the package up from a friend of Gordon's named Uncle Bob.

Q. Did he characterize that as a lie?

A. Yes, he did.

Q. Were you asked any questions concerning the last time you had been at Gordon Shuster's house?

A. Yes, he did.

Q. What were you asked?

A. When was the last time that I was at Gordon Shuster's house.

Q. What did you say?

A. I said I was there to my recollection, a week and the day before the arrest.

Q. And was your answer characterized in some way by any of the agents that were present?

[345] A. Yes, it was.

Q. What did they say? Who said what?

A. Agent McKee stated, "Yes, I seen you there the day before."

Q. Well, when was it that you determined to get other advice concerning your rights in the situation?

MR. HARRIGAN: Objection. Irrelevant.

THE COURT: Sustained.

BY MR. CHIER:

Q. Did someone in this room cancel the October 17th meeting after your answers were characterized as lies on three or four occasions?

THE COURT: Do you mean did they terminate it?

MR. CHIER: Terminate. I am sorry.

THE COURT: Was the meeting terminated?

THE WITNESS: Yes, it was.

BY MR. CHIER:

Q. Who terminated the meeting?

A. Mr. Harrigan.

Q. Now, with respect to this pager that you bought, you paid $200 for it?

A. Yes.

Q. Did that include anything in addition to the pager?

A. In terms of service for the pager, or you mean like any gratuities and whatnot?

[346] Q. In terms of any service.

A. It did include like a three-month service on the pager, yes.

Q. Did it include anything else, as a premium or part of the package deal?

A. As far as any frills for the pager, I really don't think so.

Q. Now, who lived on Ironwood?

A. I did.

Q. Was that you?

A. Yes.

Q. And did you have any reservations whatsoever about letting it be known that Gary Mezzanatto resided on Ironwood at that particular time?

A. No, I did not.

Q. Now, the letter which has been marked Exhibit No. 6, a letter to the paging company. Do you remember Mr. Harrigan—

A. Yes, the last letter of reference that he explained to me.

Q. What happened to the pager after August 1st, 1991? Who had it?

A. I assume the agents had it.

Q. And was your account with the paging company continuing to accrue?

[347] A. Yes, it was.

Q. And did you desire to cancel the service so you would no longer be liable for it?

A. Yes, I did.

Q. Is that what this letter is all about, this Exhibit 6?

A. Yes, it is.

Q. Do you know who wrote the letter?

A. No, I do not.

Q. Now, did you ever say in the meeting on October 17th, 1991 that you knew the package that you took to Mr. Shuster contained amphetamine—that you knew at the time you took the package to Mr. Shuster that it contained methamphetamine?

THE COURT: That is vague. Ask that one again.

MR. CHIER: I'll rephrase it.

THE COURT: You don't have to rephrase, just make it clear.

BY MR. CHIER:

Q. Directing your attention to the October 17th, 1991 meeting in the room with Mr. Harrigan and Mr. McKee and Mr. Moreland, did you ever say during the course of that meeting that you knew at the time you delivered the package on August 1st that you were delivering a package of methamphetamine?

A. At the time of delivering the package to Gordon Shuster, I had no knowledge of what was in the package, methamphetamine, no, I did not.

[348] Q. Did you ever tell them that you did know?

A. I told them I found out after the fact that that is what the package did contain, yes.

MR. CHIER: I have no further questions.

THE COURT: Mr. Harrigan.

RECROSS EXAMINATION

BY MR. HARRIGAN:

Q. Mr. Mezzanatto, at the October 17th meeting of this year, you were represented by counsel; is that right?

A. Counsel was there. Counsel said nothing to me at the meeting inside the meeting.

Q. You never talked at all at the meeting; is that right?

A. In the meeting?

Q. Yes. With the agents.

A. I talked to you guys, yes.

Q. And your counsel made some comments to you during that meeting, correct?

A. I don't recall.

Q. Isn't it a fact when I told you about the parameters of this meeting, I told you you were under no obligation to speak to us; isn't that right?

A. I don't recall.

Q. Isn't it a fact that the government didn't seek you out to have you talk to us; isn't that right?

A. The government was interested in talking with me, yes.

[349] Q. That was something that you and your attorney decided to do, correct?

A. That was the advice of my attorney, to talk with the government.

Q. And isn't it a fact throughout that meeting, on several occasions when the agents questioned your truthfulness, you were given the opportunity to speak to your attorney; isn't that right?

A. No. Not per se each question that was asked, no.

Q. Mr. Mezzanatto, isn't it a fact you were given more than one chance to tell the agents what occurred on August 1st; isn't that right?

A. I was asked more than one question. If that is a chance, yes.

Q. I am talking about the October 17h meeting, correct?

A. Correct.

Q. You said the only lie that you told them was you told them Uncle Bob gave you this package; is that right?

A. That is not what I said.

Q. What were the lies that you told the agents at that meeting?

A. That was one. But I don't remember actually lying, I was accused of lying on my answers. I was told—

Q. Your testimony was—

A. —life goes on, let's go watch the Bucks, Braves game.

[350] Q. Your testimony is now you never lied in the meeting; is that right?

A. I did state a lie in that meeting, yes.

Q. My question is simple. What was the lie?

A. That I picked the package up from Uncle Bob.

Q. Isn't it a fact that you also told the agents when they asked you the last time you had been at Gordon Shuster's residence in Fallbrook was over a week prior to your arrest; isn't that true?

A. To my recollection, I told them that I could remember being there a week prior. And then he said, "I seen you there the day before, he is lying again."

Q. In other words, you said you were there a week before, and we told you, "No, you were there the day before," right? That was the second lie, right?

A. No, that was the first question, approximately, that came out to me, or the second question.

Q. That is another lie you told them, correct?

A. No. I don't understand what you are saying, that is another lie I told you.

Q. It is a simple question, Mr. Mezzanatto. Did you tell the agents that the last time you were at the Fallbrook residence was over a week before?

A. To my recollection, I don't remember.

Q. You don't recall. Isn't it also a fact that you first [351] told the agents that you helped Gordon Shuster move equipment around at his residence?

A. I was told that I was—

Q. That is yes or no.

A. No—restate the question, please.

Q. Yes or no. Isn't it true that you told the agents at the October 17th meeting that prior to August 1st you had been out at Gordon Shuster's residence helping him move equipment around?

A. I was helping Gordon move his personal possessions from one property to the next and to a storage truck.

Q. And you at first indicated to the agents that you didn't know what this equipment was used for; isn't that right?

A. Exactly.

Q. Then you were given an opportunity to speak to Mr. Schneidewind; isn't that right?

A. Are we talking about the meeting?

Q. We are talking about the October 17th meeting.

A. Yeah. I was told, "Merle, get him out of here."

Q. You were given an opportunity to speak with your attorney, right? After you told us that?

A. Yes.

Q. Then we asked you again, and you told us that at some point prior to August 1st you realized Gordon Shuster was manufacturing methamphetamine; isn't that true?

[352] A. No, that is not.

Q. Now, one last question in regard to the pager. You said that letter was written simply to cut off your pager service, right?

A. Correct.

Q. And you never asked anyone to say that pager was stolen?

A. No, I never told anybody to say it was stolen. I inquired as to how the paging service is stopped so I would not acquire a bill for not even having it.

Q. You don't know how that got in the letter?

A. I do not know, no.

MR. HARRIGAN: No further questions, your Honor.

THE COURT: Anything further, sir?

MR. CHIER: Nothing further, your Honor.

THE COURT: Thank you very much, sir.

Let's take an afternoon recess. We will be in recess until ten after the hour.

Remember the admonition I give you earlier. I will be instructing later, but you are not to be concerned with any punishments that the defendant my receive, that is left entirely up to the court. It doesn't have anything to do with your decision. Okay? Ten-minute break.

(Whereupon, the following proceedings were had at the bench, outside the hearing of the jury:)

MR. HARRIGAN: May we have a brief sidebar?

[353] THE COURT: How many more witnesses do you have?

MR. HARRIGAN: Are you going to call Agent Moreland? We brought him specifically for you to call, he has been waiting around for three hours now.

MR. CHIER: These people from Fallbrook have been waiting.

MR. HARRIGAN: The only reason, if you are calling a couple of witnesses, doesn't look like you will have him.

THE COURT: He says he is short.

MR. CHIER: I have the old folks from Rainbow.

THE COURT: Are they character witnesses?

MR. CHIER: No, they are actually corroborating witnesses.

MR. HARRIGAN: Can I have an offer as to their testimony, your Honor?

THE COURT: What will they be testifying to? He wants an offer of proof.

MR. CHIER: An offer of proof? As to—I have to—why is that, your Honor, that I have to make an offer of proof?

THE COURT: Tell him what you expect them to testify to.

MR. CHIER: Why should I have to do that?

THE COURT: Everybody is entitled to that. You are entitled to it on his side. That is what an opening [354] statement is about.

MR. HARRIGAN: Your Honor, maybe I can cut this short, because I think I talked to Mr. Chier about what the testimony would be already.

He seemed – correct me if it is wrong – but I expect him to call Bernard and Lorene Cook, who were the owners of the property that Gordon Shuster resided at, to testify to the following; that Gordon Shuster duped them when he was going to buy the property out there, and told either the husband or both of them that he was simply making explosives out there.

My problem with allowing that testimony, it is not probative as to this defendant's state of mind what Mr. and Mrs. Cook thought. They can't testify as to what his knowledge was, first.

And, second, the trial is not about the manufacture of methamphetamine, it is about what did he know about that package. It is not corroborative at all for someone to say, "Hey, because duped me, he duped somebody else."

THE COURT: You never heard of an offer of proof before?

MR. CHIER: I have heard about it, your Honor, but to have to make it for corroborative witness in a criminal case, I must say that I can't imagine that I would be foreclosed from presenting a defense witness.

[355] THE COURT: If it is not going to be material, why present it? Why waste the jury's time and your time?

The question is what they are going to testify to, and why is it relevant? Everybody is entitled to have that.

MR. CHIER: What counsel says is essentially correct; however, there is more to it than that.

THE COURT: Show us how your client is implicated in it.

MR. CHIER: The witness, Mrs. Cook, will establish – will corroborate my defendant in that this individual, Gordon Shuster, is persuasive, is cunning, is

convincing. Told them he was working for the CIA or a government agency. Told them he was manufacturing explosives. That is corroborative of what my client believed.

And what he believed, your Honor, is his state of mind; and his state of mind is probably the most fundamental issue in this case.

THE COURT: Do you have a case on point?

MR. CHIER: No, I don't, your Honor.

THE COURT: I don't think that is admissible to show because somebody believes one person that your client has to believe him too.

MR. CHIER: My client – no. My client's belief is independent of what Mrs. Cook believes.

[356] THE COURT: Hold that in mind. Think about that.

MR. CHIER: My client –

THE COURT: Why should Mrs. Cook be able to get up on the stand and testify as to what she believed?

MR. CHIER: Because it tends to establish that this man was making these statements. And that they were –

THE COURT: –Did she hear him make the statements in your client's presence?

MR. CHIER: Did Mrs. Cook hear what?

THE COURT: What that person said in your client's presence?

MR. CHIER: I don't believe I could establish that, your Honor.

THE COURT: Then it doesn't help us at all.

MR. HARRIGAN: It would be much the same as me calling somebody else that Gordon Shuster worked with to show this guy knew, so Mr. Mezzanatto should know.

THE COURT: You are ahead right now.

MR. CHIER: Pardon me, your Honor?

THE COURT: He is ahead right now.

MR. CHIER: I am not trying to show that she knew anything, because it is not a question of knowledge, it was all B.S.

We are not talking about knowledge about anything, we are talking about the belief, and that representation.

[357] THE COURT: He is here to tell us that he believed it. She can't help us.

MR. CHIER: But he is the defendant, your Honor. It is very helpful in a criminal case if there is some totally innocent –

THE COURT: Well, I have ruled this way, and the fact that Shuster told somebody else the same thing he told your client is not relevant to your client's belief, it is not helpful.

MR. CHIER: It is not helpful?

THE COURT: No. No one can testify to what his belief is except him.

MR. CHIER: If she can describe the person as being – his belief in this regard as to be somewhat reasonable.

THE COURT: He can tell the jury. If they believe him, that is it.

MR. CHIER: If I can establish through the person who was victimized by Mr. Shuster, who was basically conned into letting him use their property for two years, and were lied to by this man and they believed him, that he was convincing, then it is not going to appear –

THE COURT: Show me in a book. You have about ten minutes to show me in the book. Here is the book.

MR. HARRIGAN: Your Honor, real briefly, the only [358] other side thing I am concerned about, just for the record, is this issue he raised about Kastigar and the statements coming in.

I would like to state for the record that when this debriefing occurred on October 17th, Mr. Mezzanatto was

told three things – and I don't believe this needs to be before a jury.

THE COURT: You are entitled to put that in.

MR. HARRIGAN: What he was told was the following:

That it wouldn't be used against him unless he lied to us. He could be subject to false statements for perjury.

That if he somehow he didn't cooperate with us, it was called off, he ended up going to trial and he took the stand and told us something different than what he told us there, we would use it to impeach him.

And, third, we made it very clear to the attorneys present that we not go through a Kastigar hearing, that we would make derivative use of any evidence he provided us, which essentially was nothing.

THE COURT: If that is what you want to present to the jury, that is fine.

MR. HARRIGAN: I don't want to present it to the jury, but the problem I have is that Mr. Chier did a last-minute motion that Judge Thompson rejected. And he raised now –

[359] THE COURT: The jury doesn't know what Kastigar means.

MR. HARRIGAN: That is right. But I am saying, for the purpose of my record, I want to make it clear that there was an agreement that there would be no Kastigar hearing at the time.

THE COURT: Who asked for him to come forward and come to you?

MR. HARRIGAN: His attorney, Merle Schneidewind.

THE COURT: That is up to you. I have nothing to do with it.

MR. CHIER: What time—I was going to make a phone call to my brother-in-law, who is usually much faster. Can I do that, Judge?

THE COURT: Sure.

Right now, I can't see where the testimony is admissible.

MR. CHIER: Can I have until 3:20?

THE COURT: You have until 3:20.

(Recess.)

MR. CHIER: My decision to call Mr. Moreland or Mr. McKee will be influenced greatly by your decision in respect to the witnesses.

THE COURT: With reference to someone else testifying that this man lied to them and therefore that is [360] evidence to help you show that he lied to your client, or that they believed him and therefore your client believed them, that is not admissible. That is not relevant.

So I would rule, no, that evidence is not admissible, so there is no need to call them. You made the offer of proof.

(Discussion off the record between the defendant and his counsel.)

MR. CHIER: Could I just flesh out the offer of proof as to these people, just for the record?

THE COURT: I thought you had, and that is what you told me. You are entitled to do that, certainly. Make your record clear.

MR. CHIER: Let me just think out loud here, Judge.

I would offer to prove through witness Lorene Cook, who is present in the hallway, that she has lived in the community of Rainbow for 20 years, more or less.

That she and her husband, Bernard Cook, own 32 acres of property in an isolated, secluded part of the northern county of San Diego.

That approximately two years ago they responded to an ad by an individual looking for property to buy in a remote, secluded area. That the person—that the advertiser

turned out to be none other than the self-same Gordon Shuster, who has figured prominently in this case, at [361] least by name.

That Mr. Shuster, through charm, persuasion, salesmanship, force of personality, insinuated his way onto the property, together with a house trailer and about four acres of miscellaneous personal property, without paying any rent, and by making promises of easy money and lucrative investments to Mr. and Mrs. Cook.

That on numerous occasions, Mr. Shuster represented to Mrs. Cook, or to Mr. Cook in the presence of Mrs. Cook, that he was employed by the CIA, on some occasions, on other occasions that he was employed by Special Forces.

That his father, that is to say the father of Gordon Shuster, was a highly-ranked individual in the United States military, I believe army.

That one of the assignments being worked on by Mr. Shuster at that location was the manufacture of a plastic type of explosive which would not be—which would not constitute or create a great risk for property or persons on the premises because of the need for a detonator, a specialized kind of detonator for the plastic, which should therefore allay any fears that people might have of being blown to bits by this plastic.

That Mr. Shuster was, according to Mrs. Cook, convincing and persuasive, and that she believed that he was engaged in this type of activity, based on the strength of [362] his representations, and based upon what she perceived to be the unorthodoxed manipulation of substances on the property within either view of the house resided in by the Cooks or at least within odor of their house.

And that, for all of these reasons, the testimony concerning what Mr. Shuster did vis-a-vis the Cooks is relevant and exculpatory as to Mr. Mezzanatto on the issue

of his specific intent; to wit, his knowledge of the nature and character of the substance that he was delivering.

That would be my offer of proof, your Honor.

THE COURT: Would that be as to both of the parties?

MR. CHIER: That would be as to both of the witnesses, your Honor.

THE COURT: Does he know them?

MR. CHIER: Does he know them? Only as a result of being present during—I think this trial started—no, Monday night we went there and he met them for the first time. He had seen them, I think, once.

THE COURT: Then they never told him these things before he got involved in this matter.

MR. CHIER: We did not know that the people had been telling him—

THE COURT: Listen to my question.

MR. CHIER: All right.

THE COURT: Did those folks ever talk to your client [363] before he got involved with this drug transaction?

MR. CHIER: Vis-a-vis these representations by Mr. Shuster? No.

THE COURT: Then it is not relevant. I would rule it is inadmissible.

MR. CHIER: All right.

THE COURT: So the other thing you have, you have two government witnesses. Do you want to call them for your case?

MR. CHIER: Under the circumstances, I think I won't.

THE COURT: Then you are prepared to rest?

MR. CHIER: I am prepared to rest, and I have some jury instructions that I strung together.

THE COURT: What I propose to do is—do you have rebuttal?

MR. HARRIGAN: I have Agent Moreland.

THE COURT: Let's get the jury in. You say you rested, and we will get the rebuttal in.

MR. HARRIGAN: Rebuttal today?

THE COURT: Yes, I would like to get it out of the way today.

MR. CHIER: I better excuse these witnesses, Judge.

THE COURT: Go ahead.

(Whereupon, the following proceedings were had [364] in open court, in the hearing of the jury:)

THE COURT: All parties are present.

Attorney Chier, you are ready to rest your case?

MR. CHIER: Yes. The defense rests.

THE COURT: Do you have any evidence you wish to have admitted that has not been admitted, any exhibits?

MR. CHIER: May I look at Defendant's A, please?

THE COURT: Sure.

THE CLERK: Four pages of Mr. Moreland's rough notes.

THE CLERK: You have them, I don't have them.

That was marked, your Honor, yesterday. It has not been received in evidence yet.

THE COURT: We will go over whether we will receive that or not later.

We will go to rebuttal, now, folks.

MR. HARRIGAN: The government would call Tristan Moreland.

THE CLERK: State your full name for the record. You are reminded you are still under oath.

THE WITNESS: Tristan Moreland.

DIRECT EXAMINATION

BY MR. HARRIGAN:

Q. Agent Moreland, you understand you are still under oath?

A. Yes, sir.

[365] Q. Agent Moreland, were you present at a meeting on October 17th at my office?

A. Yes, I was.

Q. U.S. Attorney's office?

A. Yes, sir.

Q. Who else was present at that meeting?

A. Agent McKee was there. Mr. Mezzanatto, and his former attorney, I believe his name was Merle Schneidewind. And yourself.

Q. And what was the purpose of that meeting?

A. The purpose of the meeting was that Mr. Mezzanatto and his attorney had come to the government and asked or, basically, requested a meeting. That he decided he wanted to cooperate with the government, and basically provide some information in hopes he might receive some type of consideration for sentencing in the case.

Q. How long did that meeting last, do you recall?

A. Altogether, 15, 20 minutes, total.

Q. And during that meeting, were any guidelines set down by the government as to—by myself as to the parameters?

A. Yes, there were.

Q. What did I instruct Mr. Mezzanatto?

MR. CHIER: I am going to object to this on the grounds of self-serving hearsay. Irrelevant.

THE COURT: Overruled. It was part of the meeting [366] and I allowed you to go into that facet, so they are entitled to come back with more information about it. Overruled.

THE WITNESS: Basically that Mr. Mezzanatto would have to provide information.

That anything he told us would have to be truthful. Anything he lied about, of course, he would be subject to being charged with false statements.

And if he decided to later take the stand in his defense, anything that he might say at this meeting could be used to—basically for perjury reasons. If he told us one thing at that meeting and later told us another thing and they were contradictory to each other, that that could be brought up in a trail setting.

He was reminded that if he decided to plead guilty, of course, he would receive some consideration for any truthful information.

That if we were able to use any of his information at a later date, that further consideration may be given at a later time.

I think he was also reminded of—we referred to something in a Kastigar meeting about some type of—the information being used at a later time. I don't recall all of the details of that particular area.

BY MR. HARRIGAN:

Q. All right. Did I say anything to Mr. Mezzanatto about [367] his obligations to talk to the government?

A. Basically I believe you just told him that he had no obligation to talk to us. I mean, you gave him, basically his rights under Miranda, the same when we arrest somebody. You told him he didn't have to talk to us.

But you also told him that none of the information would be used against him in your case in chief, only if he lied and he took the stand. Or if he lied to us, we might use it as false statements against him.

Q. What did Mr. Mezzanatto tell you and myself at that meeting about his involvement with methamphetamine?

A. Basically he started off by telling us that he had only dealt ounce quantities of methamphetamine prior to me meeting him on August 1st.

He said that this was the first time he ever dealt a pound of methamphetamine. And he knew, in fact, what he delivered to me was methamphetamine.

Q. What did he describe as his role in this August 1st incident?

A. He said that he was acting basically as a broker. He said he had gone to a person by the name of Uncle Bob.

And he said that the dope that he had gotten from Uncle Bob was actually Gordon Shuster's, somehow it had come from Gordon or—I don't know if he knew Gordon made it, but he said it was Gordon Shuster's.

[368] And that he had gone to Uncle Bob and obtained the pound from Uncle Bob, and then brought it down to me.

Q. What else did he say in regards to any methamphetamine lab at Gordon Shuster's residence?

A. I believe we first questioned him about what his involvement was out there.

He stated that—the first time we talked to him he said he had moved some stuff around out there and helped set some stuff up, and had done some work like that for Gordon out there, and really didn't know anything about the manufacturing.

Then basically Agent McKee and myself didn't believe him at that point and confronted him with our disbelief of that, based on other information we had.

Q. What did you do at that point?

A. Right at that point he decided to leave the room with his attorney, and they came back a couple of minutes later.

And we again asked him—I think we asked him something about, "were your fingerprints going to be found on any of this glassware?" So on and so forth.

Then he admitted that, yeah, he had helped handle some of the glassware and help set it up, and he knew it was a methamphetamine lab.

Q. All right. At any point in that meeting did you ask, you or Agent McKee, ask defendant Mezzanatto when he had last [369] been at Shuster's property?

A. Yes. We got to the point where I think we were both getting a little frustrated. I decided to ask him a simple question. I was testing whether he could be truthful about anything.

I asked him specifically, "when was the last time prior to August 1st you were at the residence of Mr. Shuster?"

Q. What did he say?

A. He stated it had been at least a week prior to the August 1st date.

Q. After he stated that, what did you or Agent McKee say?

A. We accused him, basically, of lying about that.

Agent McKee told him that we had seen his vehicle out there the day before and knew he had been there.

Then he started changing his story and saying, "Yeah, maybe I had been out there the day before."

At that point we just decided to terminate the meeting.

Q. At any time during that meeting was defendant Mezzanatto given the opportunity to speak with his then attorney, Merle Schneidewind?

A. Was he given the opportunity to speak with his attorney?

Q. In private.

A. Yes, sir.

MR. CHIER: Objection.

THE COURT: Overruled.

[370] BY MR. HARRIGAN:

Q. How many occasions would you estimate?

A. I remember two specific occasions where they were privately speaking with each other outside of the room from us.

There may have been a third, but I remember the two.

Q. When you say this meeting lasted 20 minutes, that was the actual time that you talked to him? The total time lasted much longer, correct?

MR. CHIER: Objection, leading.

THE COURT: It is leading, but I think he is trying to clarify it, so that is a proper question to ask.

MR. CHIER: He is trying to correct his own estimate of 40 minutes.

THE COURT: No, I think he is just trying to make it clear for the jury. Overruled.

THE WITNESS: When I spoke about the 20-minute meeting, I was talking about from the time that basically we sat at the table, and the total length of conversation. There were ten-minute periods, I think, where he left with his attorney.

Our conversation with Mr. Mezzanatto was actually no more than 20 minutes in time.

BY MR. HARRIGAN:

Q. Now, at any point in time, did Gary Mezzanatto ever [371] mention anything about the fact that he thought Gordon Shuster was making explosives out there?

A. No, not to me. Not in that room.

Q. Did he ever mention anything about the CIA?

A. No, he didn't.

Q. Did he ever mention anything about turning seawater into gold?

A. No, he didn't.

MR. HARRIGAN: No further questions.

THE COURT: Counsel?

MR. CHIER: I have a few, your Honor.

CROSS EXAMINATION

BY MR. CHIER:

Q. Do you remember on October 17th, 1991 at some time during the course of this meeting with you and Mr. Schneidewind and Mr. Mezzanatto that he said that he was afraid for his life and the life of his family?

A. I believe initially in the meeting he mentioned something about – something about that, yes.

Q. Did you put that in the report that you made of this meeting?

A. No, I didn't.

Q. Did the report include any reference to the question about fingerprints on the glass?

A. I don't recall putting that in the report.

[372] Q. Did the report include any reference to this alleged statement that he knew prior to August 1st there was a laboratory for the manufacture of controlled substances in place at that location?

A. I don't recall. I don't think that is in the report, but I don't recall.

Q. And did you know if there was any reference in the report of this meeting to any statements by Mr. Mezzanatto that he – his involvement at that location was limited to moving stuff around?

A. Can you ask that again?

Q. Yes, I can. That was a bad question.

I think you testified on direct rebuttal that Mr. Mezzanatto's stated involvement at this meeting was that he had moved some stuff around at the request of Mr. Shuster at this location.

A. Initially.

Q. Initially.

A. Initially. Right, that is what we talked about.

Q. And then, supposedly, he was braced with this evidence of fingerprints on the glass, and he changed his statement; is that correct?

A. Well, no. He went out and had a meeting with his attorney, and I am not sure if before that meeting or after, I am not even positive we said your fingerprints were found [373] on the glass, but I think what we said was, "We have information, maybe, that you had handled some of the glassware."

I don't know if I actually said to him, "Your fingerprints are going to be found on the glass," or anything like that.

I think it was just that there was some indication that we had information that, in other words, he had handled the glass.

Then after the meeting with the attorney where we had basically told the attorney—

Q. Wait, wait, wait. I think we got a little out of control here.

I just want to know if it was at the point that you said something about "fingerprints on the glass" that it appeared to you he was changing his statement?

A. No, I don't think it was. I don't recall it being at the same point.

Q. If, in fact, anything had been said at that meeting to Mr. Mezzanatto about fingerprints being on the glass, that would have been a misrepresentation, wouldn't it? There were no fingerprints, were there?

A. I don't believe at that meeting I had any knowledge whether there were or not.

All I know is that there was an attempt to take [374] fingerprints, I don't know if fingerprints were actually taken or not. But I know there were plenty of opportunities that that was possible.

Q. And you can sure tell when fingerprints have tried to have been lifted off of an object, can't you?

A. Generally.

Q. It makes a mess, doesn't it?

A. Not necessarily. It depends on the method that you use.

Q. How about off plastic?

A. It all depends on what method you use to remove the fingerprints.

MR. HARRIGAN: Objection. Lack of foundation. Agent Moreland is not a fingerprint expert and is not competent to testify to this.

No offense.

THE WITNESS: I agree.

THE COURT: Just a moment. You are in the area where the fingerprints were lifted off of the glass?

MR. CHIER: Yes.

THE COURT: And you are going to ask him if he knows?

MR. CHIER: Yes.

THE COURT: I think you are entitled to do that, but then—

MR. CHIER: I am not going to push it.

[375] THE COURT: All right.

BY MR. CHIER:

Q. Do you know whether or not fingerprints were lifted off of the dope in this case, the narcotic?

A. We are talking about the Exhibit 1?

Q. Any latent prints lifted off of the package?

A. I don't know for sure, no.

Q. Do you know if any were requested?

A. I don't know that either.

Q. Let me ask you one other question. This meeting on October 17th, could that be characterized, kind of, as a game of "Liar's Poker"?

MR. HARRIGAN: Objection. Argumentative.

THE COURT: That is unintelligible, too. What is Liar's Poker?

MR. CHIER: I will withdraw the question, your Honor.

May I have one moment?

THE COURT: Yes, sir.

MR. CHIER: I do have a question.

THE COURT: Go ahead.

BY MR. CHIER:

Q. I have just a little bit of a question here with respect to the art of report writing.

One of the things that the federal law enforcement [376] officers do a lot of is report writing; isn't that true?

A. I would say that is true.

Q. Especially when there has been an arrest and prosecution pending?

A. That is true.

Q. And in these narcotic cases, the reports are done on kind of a printed format called a "DEA-6"?

A. If DEA is—yeah, right. That is their form for that, yes.

Q. In this particular case, you used that form, did you not? If you know.

A. I believe eventually it was typed on one of those forms.

Q. Those reports have several purposes, one of which is to refresh the recollection of the officer/writer of the reports if he should be testifying at some time quite a bit later than the incident, right?

A. I would say that is correct.

Q. Another purpose is for it to include, as complete as possible, a compilation of facts so that the agent who may be questioned about the report isn't embarrassed, right? About the omission of certain facts?

A. Not necessarily. I mean, there is oftentimes where you omit certain facts intentionally, you don't want them in a certain report. It all depends on the particular report.

Q. When a report then says that somebody essentially [377] provided certain information, does that mean that that is merely the conclusion of the writer of the report as to what was said by the person? Essentially, does that mean—what does that mean?

MR. HARRIGAN: Objection as to relevance.

THE COURT: No.

MR. HARRIGAN: I will withdraw my objection. I am sorry.

THE WITNESS: What exactly was your question?

BY MR. CHIER:

Q. My question is this; if you were to say that somebody provided essentially the following information, would that be the writer's conclusion as to what the person was talking about?

A. It would probably be the writer's conclusion as to information the writer felt was pertinent about what the person talked about, pertinent to the case or pertinent to the debriefing, or, you know.

Q. When the word "essentially" is used, it is used in the sense of reducing something to its essence?

A. As to what the writer's essence?

Q. Right.

A. What the writer believes is the essence.

Q. Wouldn't that be?

A. I would say that is a fair assumption.

[378] Q. So when the report in this case concerning this October 17th meeting says that Mezzanatto "essentially" provided the following, that means that there was some subjective evaluation by the writer of the report; isn't that correct? As to what the essence was of the information?

A. Well, yeah. That is anytime anybody writes, it is subjective.

Q. This is not a criticism.

A. Yeah. It is hard to answer yes or no.

Q. Now, do you know when the report of the October 17th meeting with Mr. Mezzanatto was actually prepared, Mr. Moreland?

A. I don't recall the exact date, but it was probably early this month or late November.

Q. December 5th, 1991, does that refresh your recollection?

A. That could be correct, yes.

MR. CHIER: I have no further questions.

MR. HARRIGAN: No questions.

THE COURT: Thank you very much, sir.

THE WITNESS: Thank you, your Honor.

THE COURT: Is there any other rebuttal, Mr. Harrigan?

MR. HARRIGAN: That is it, your Honor.

THE COURT: Do you have any surrebuttal?

MR. CHIER: Are you going to disallow the [379] questioning of Mr. Harrigan? I was going to call Mr. Harrigan as a witness.

THE COURT: He is a lawyer in the case, you can't call him as a witness. You had the person that was closest.

Do you have any other evidence you want to offer?

MR. CHIER: No, your Honor.

THE COURT: That is all the evidence, folks.

I propose this, gentlemen, I propose to do this; let the jury go home now, and we will have you back tomorrow morning at 9:00 to go over the instructions. We will have the jury in at 10:00, start the arguments, and we should have them out by noon.

MR. CHIER: Sounds good.

THE COURT: That is all the evidence in the case, and the lawyers and I have to get together about the rules of law.

Please come back tomorrow morning at 10:00, then we will let the lawyers argue the case to you.

And don't make any plans for lunch tomorrow, you can make those later and decide you want to go out to lunch or have sandwiches brought in to you.

We will see you tomorrow morning at 10:00. Have a pleasant evening, and remember the admonition I gave to you earlier.

I will see counsel tomorrow morning at 9:00.

[380] If you have any other instructions, I appreciate you submit to me at this time.

MR. CHIER: I have some, your Honor. They are not in the format I like to submit them in.

THE COURT: Just give them to Mac before you leave, please.

MR. CHIER: Yes, your Honor.

Supreme Court of the United States

No. 93-1340

UNITED STATES, PETITIONER

v.

GARY MEZZANATTO

ORDER ALLOWING CERTIORARI. Filed April 18, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

April 18, 1994

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OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide that statements made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty ordinarily may not be admitted against the defendant who made the statements. The question presented in this case is whether the government may use such statements to impeach the defendant's contrary testimony at trial, when the defendant and his counsel expressly agreed before those statements were made that the government would have the right to use the statements in that manner.

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No. 93-1340

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 998 F.2d 1452.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1993. A petition for rehearing was denied on November 9, 1993. Pet. App. 20a. On January 28, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 9, 1994. The petition was filed on February 22, 1994, and was granted on April 18, 1994. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

RULES INVOLVED

Rules 102 and 410, Fed. R. Evid.; and Rules 2 and 11(e)(6), Fed. R. Crim. P., are reproduced in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted of possessing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 170 months' imprisonment, to be followed by 60 months' supervised release. The court of appeals reversed. Pet. App. 1a-19a.

1. On the morning of August 1, 1991, San Diego Narcotics Task Force (SDNTF) agents arrested Gordon Shuster during the execution of a search warrant at a Rainbow, California, residence where Shuster operated a clandestine laboratory for manufacturing methamphetamine. Shuster agreed to cooperate with the SDNTF agents in apprehending others involved in the methamphetamine trade. Tr. 101-106, 152-156.

That afternoon, Shuster placed a call to respondent's pager. When respondent returned Shuster's call, Shuster said that one of his friends wished to purchase a pound of methamphetamine for $13,000, and that the friend would "front" additional money toward the purchase of a second pound of methamphetamine to be delivered later. Shuster made arrangements to meet respondent later that day, and the two met at a local restaurant that evening. Tr. 108-109, 113-114, 121-129.

In the course of the meeting, Shuster introduced respondent to an undercover officer who was posing as Shuster's "friend." The officer asked respondent if

he had "brought the stuff with him," to which respondent replied that it was in his car. Respondent and the officer then went to the car, where respondent pointed to a brown paper package. The officer inspected the package, which contained approximately one pound of methamphetamine, and asked how long it would take to produce the second pound. Respondent replied that it would take about six hours. Respondent then took out a glass pipe (later found to contain methamphetamine residue), pointed to the package, and asked the officer if he wanted to take a "hit"—*i.e.*, smoke some of the methamphetamine. The officer replied that he would first get the money. The officer then left the car and gave a pre-arranged arrest signal. Respondent was arrested. Tr. 130-138, 228-229.

2. On October 17, 1991, respondent and his attorney requested a meeting with the Assistant United States Attorney (AUSA) prosecuting the case to discuss respondent's participation in the offense, with a view to offering his cooperation to the government. The AUSA agreed to meet with respondent and his attorney, and the meeting took place on that day. Two SDNTF agents who were familiar with the investigation were also present. Tr. 359, 365-367; J.A. 91, 96-98.

The AUSA began the meeting by emphasizing that respondent was under no obligation to talk, but that if respondent wanted to cooperate with the authorities, he would have to be completely truthful. The AUSA advised respondent that statements he made during that proffer session would not be used as evidence in the government's case-in-chief if respondent proceeded to trial, but that the government's willingness

to entertain respondent's proffer was conditioned on his agreement to allow the government to use his statements in other ways. Specifically, the government would be permitted to use those statements in a subsequent perjury or false statements prosecution, and to impeach respondent's testimony if he went to trial and gave testimony that differed from the statements he made at the meeting. After the AUSA gave respondent an opportunity to discuss the government's terms with his attorney, respondent and his attorney agreed to them. Tr. 323-324, 358, 366-367, 369-370; J.A. 64-65, 90-91, 96-98, 99-100.

Respondent then stated that he had dealt only in ounce quantities of methamphetamine prior to his arrest, but that he knew that the package he attempted to sell to the undercover officer contained methamphetamine. Respondent initially claimed that he was merely acting as a broker for Shuster, and that he had not known that Shuster was manufacturing methamphetamine on the Rainbow property. Later in the meeting, however, respondent admitted that he had known that Shuster was engaged in the manufacture of methamphetamine, and that he had helped Shuster move glassware used in that process. Respondent then sought to minimize his involvement in the operation by claiming that he had not visited the Rainbow property for at least a week before his arrest. The SDNTF agents confronted respondent with surveillance evidence showing that his car was on the Rainbow property the day before the arrest—and that respondent's contrary claim was therefore a lie. Citing respondent's failure to provide completely truthful information, the AUSA terminated the meeting. Tr. 181, 367-369; J.A. 97-99.

3. Respondent took the stand in his defense at trial. He gave an elaborate account of his relationship with Shuster, in which he claimed that he had helped Shuster with various projects in the belief that Shuster worked for the Central Intelligence Agency (CIA). Respondent purportedly believed that Shuster was using the Rainbow property to manufacture plastic explosives for the CIA. Respondent also claimed that he had obtained a pager at Shuster's request, in order to allow Shuster to contact him when Shuster had projects for him to carry out, and that Shuster had instructed him to list the pager under a fictitious name to prevent anyone from tracing respondent's connection to Shuster. Tr. 265-267, 276-280, 303, 305-307; J.A. 20-21, 28-32, 49, 50-52.

Respondent testified that he was not involved in methamphetamine trafficking, and that he did not know that the package he delivered to Shuster contained methamphetamine. Instead, respondent claimed that he received the package from Shuster the day before his arrest, that Shuster expressed concern at that time that the neighbors were becoming "nosey" about his explosive-making activities, and that respondent had accordingly surmised that the package contained plastic explosives. Respondent also testified that Shuster paged him repeatedly on the day of his arrest to arrange for delivery of the package, and that respondent agreed to deliver it in exchange for $1,300. Respondent explained his conversation with the undercover agent by stating that he was just "playing along" and that it was "Gordon[] [Shuster's] deal." Tr. 275-278, 282-288, 312-315, 334-335; J.A. 28-30, 33-38, 55-58, 72-74.

On cross-examination, the prosecutor, over objection, questioned respondent about his inconsistent statements at the October 17, 1991, meeting and about his failure to advert to Shuster's purported CIA connections at that time. Respondent denied having stated that he knew the package contained methamphetamine, or that he had trafficked in ounce quantities of methamphetamine. Tr. 290-295, 318-322, 351-352; J.A. 39-43, 60-64, 85-87. The government then called one of the agents who was present at the meeting. The agent recounted respondent's prior inconsistent statements. Tr. 365-371; J.A. 96-101. The jury found respondent guilty.

4. A divided panel of the court of appeals reversed. The court began by noting that Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410 are both "quite clear" that a statement made in the course of plea discussions with the attorney for the government is "not * * * admissible against the defendant" except (i) when another statement made in the same discussions has been introduced and the statement in fairness should be considered with it, and (ii) in certain prosecutions for perjury or false statement. Citing *United States* v. *Lawson*, 683 F.2d 688 (2d Cir. 1982), the court concluded that the language rendering such plea discussions "not admissible," read in light of its legislative history, bars the use of such statements to impeach the defendant. Because neither of the exceptions to the rules applied, the court held that the rules barred the admission of the statements made by respondent during the October 17, 1991, proffer session. Pet. App. 4a-5a.

The court next concluded that a defendant may not waive the protections of Rules 11(e)(6) and 410, even when he agrees to do so with the advice of counsel. In the court's view, "candid and effective plea bargaining could be severely injured" if the rules were subject to waiver, because waiver "could easily have a chilling effect on the entire plea bargaining process." Pet. App. 7a. The court rejected the government's submission that a defendant may waive his rights under the rules just as he may waive constitutional rights, explaining that judicially created waivers of constitutional rights are "an inescapable feature of courts interpreting the Constitution by defining the right being asserted." *Id.* at 9a. By contrast, "[t]o write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress * * * is not an inescapable duty. It more resembles unwelcome advice." *Ibid.* Finally, the court stated that "the government should not be given the ability to extract a waiver of [the] rules from a defendant who is in a weak bargaining position," because "[w]ith such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy." *Ibid.*

Chief Judge Wallace dissented. He noted that criminal defendants may waive the most fundamental rights afforded them by the Constitution, and that it is therefore anomalous to create "a per se rule which invalidates any and all waivers of the protections afforded * * * by" Rules 11(e)(6) and 410. Pet. App. 12a. Chief Judge Wallace also disagreed with the majority's contention that to permit the government to obtain a waiver would undermine the policy underlying the Rules. He noted that the only

"rights" a defendant waives are the "right" to lie at some stage of the prosecution and the "right" to engage in plea bargaining, neither of which is truly a "right." *Id.* at 14a-15a (citing, *inter alia*, *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986)).

Chief Judge Wallace also found speculative the majority's concern that waivers may reduce the incidence of plea bargaining, and he rejected the majority's assumption that its absolute rule against waiver was needed to avoid abuses by the government. He noted that in *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), this Court emphasized its unwillingness to assume that prosecutors will engage in wrongdoing, and the Court upheld an agreement in which an arrestee waived his right to pursue a civil rights action in exchange for dismissal of all criminal charges against him. Chief Judge Wallace explained that, unlike the defendant in *Town of Newton*, who "gave up a potentially legitimate civil rights suit," respondent merely "gave up his ability to provide inconsistent testimony." Pet. App. 19a.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that a defendant may never agree to waive his rights under Rules 11(e)(6) and 410, even when he does so upon the advice of his counsel. That conclusion finds no support in the text of Rules 11(e)(6) and 410 or in the general considerations of public policy on which the court of appeals relied.

A. The language of Rules 11(e)(6) and 410 refutes the view that Congress intended to enact a "waiverless rule," because it provides that evidence may not be admitted "against the defendant." In other contexts, this Court has found that language that confers

rights upon a party to litigation creates personal rights in that party, which that party may therefore waive if he should find it advantageous to do so. That Congress intended to permit waiver of the inadmissibility of plea statements is confirmed by the fact that the Federal Rules of Criminal Procedure and Evidence each incorporate basic principles of forfeiture. As the court of appeals recognized, those principles preclude a defendant from obtaining reversal based on the admission of plea statements if the defendant failed to object at trial. Yet the court of appeals did not explain why it is sensible to believe that Congress intended to authorize such "implicit" waivers, but to forbid counseled, knowing, and explicit ones.

Respondent derives no help from cases decided under the Fair Labor Standards Act (FLSA), on which he heavily relies. Those cases confirm that whether a statutory right may be waived depends on the intention of Congress as manifested in the particular statute. Rights conferred by the FLSA are not subject to waiver because the structure and history of that Act demonstrate that its whole point was to prevent certain types of private employment contracts, and because individual waivers would exert a downward pressure on wages and thereby adversely affect the interests of others. By contrast, respondent cannot establish that the language, structure, or history of Rules 11(e)(6) and 410 demonstrates a congressional intent to forbid waiver, nor has he seriously suggested that a decision by an individual defendant to waive the inadmissibility of his plea discussions for impeachment purposes implicates the rights of *other* defendants.

B. There is no sound public policy reason for denying enforcement to respondent's agreement. The court of appeals was wrong to conclude that plea bargaining will be hampered by agreements that permit the government to use a defendant's plea statements for the limited purpose of impeaching his later contrary testimony at trial. Because plea bargaining is a two-sided process, that process is most likely to be advanced when the parties themselves are permitted to agree on the terms on which it will be conducted.

The court of appeals' assessment of the relevant public policies also overlooked the importance of the cooperation context in which respondent made his statements—a context that differs from traditional plea bargaining in significant respects. Most importantly, the fact that the information conveyed by the defendant is intended for use in other prosecutions and investigations (including potentially life-threatening undercover work) gives the prosecutor a compelling interest in its veracity that is not present in traditional plea bargaining. The agreement condemned by the court of appeals furthers that compelling interest by providing some assurance that a would-be cooperating witness will take seriously his obligation to give a truthful proffer. That agreement is also an important inducement in persuading prosecutors to meet with would-be cooperators, because such meetings require substantial law enforcement resources and cannot be held for all defendants who express a possible interest in cooperation. The court of appeals permitted respondent to obtain the full benefit of his bargain—the opportunity to meet with the prosecutor and agents—while completely relieving him of any obligation to comply with his side of the deal.

Finally, the court of appeals' ruling seriously disserves the compelling public interests in the truth-finding function of the trial and in the punishment of the guilty, because it permits criminal defendants to turn the purported unwaivability of Rules 11(e)(6) and 410 into a license to commit perjury, and to present tailored defenses insulated from effective challenge. That result cannot be reconciled with the basic canon that governs interpretation of evidentiary provisions—*i.e.*, that they "shall be construed to secure fairness in administration * * * to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102.

ARGUMENT

RESPONDENT'S AGREEMENT WAIVING HIS RIGHTS UNDER RULES 11(e)(6) and 410 IS VALID AND ENFORCEABLE

The issue in this case is whether courts may enforce an agreement that gives the government the right to impeach a defendant's trial testimony with earlier inconsistent statements made by him during plea negotiations. The Ninth Circuit held that the courts may not do so, even when the defendant expressly agrees to permit such impeachment on the advice of counsel and before plea discussions commence, in order to induce the government to participate in those discussions.

The Ninth Circuit first concluded that Rules 11(e)(6) and 410, which provide that statements made during plea discussions ordinarily are "not admissible," do not themselves authorize the use of such

statements for impeachment. We agree with that conclusion, which is consistent with the views of other courts of appeals that have considered the same question. See *United States* v. *Dortch*, 5 F.3d 1056 (7th Cir. 1993), petition for cert. pending *sub nom. Suess* v. *United States*, No. 93-7218 (filed Dec. 20, 1993); *United States* v. *Lawson*, 683 F.2d 688 (2d Cir. 1982).

We disagree, however, with the Ninth Circuit's further conclusion that a defendant may never validly agree to forgo his rights under Rules 11(e)(6) and 410; a waiver of that sort, the court held, is contrary to the public policy in favor of plea bargaining. In so ruling, the Ninth Circuit parted company with other circuits that have upheld the validity of such waivers. See *United States* v. *Dortch*, 5 F.3d at 1067-1068; *United States* v. *Perrone*, 936 F.2d 1403, 1412, clarified on other grounds on reh'g, 949 F.2d 36 (2d Cir. 1991); see also *United States* v. *Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (noting that such waivers are common in plea agreements).

In our view, the language of Rules 11(e)(6) and 410, and well-settled forfeiture principles that are incorporated in the Rules of Criminal Procedure and Evidence, refute the view that Congress intended to forbid all waivers of a defendant's rights under Rules 11(e)(6) and 410. In addition, respondent has no valid public policy defense to enforcement of his agreement with the government. Accordingly, his waiver of rights under those rules should be enforced.

A. The Protections of Rules 11(e)(6) and 410 May Be Waived By A Defendant's Agreement

1. Respondent contends (Br. in Opp. 21-23) that the nonwaivability rule adopted by the Ninth Circuit is

supported by the "mandatory" character of Rules 11(e)(6) and 410. That contention would have force if the rules were "mandatory" in the sense of expressly providing that their waiver is forbidden. But that is not what Rules 11(e)(6) and 410 say. The text of those rules "provides no support for the proposition that Congress intended to ban all * * * waivers." *Evans* v. *Jeff D.*, 475 U.S. 717, 730 (1986). Thus, the rules are "mandatory" only in the sense that they preclude certain conduct by the government *in the absence of the defendant's agreement.* As Chief Judge Wallace correctly recognized (Pet. App. 11a-12a), Rules 11(e)(6) and 410 are no more "mandatory" than the rule providing that the right of the people to be secure against unreasonable searches and seizures "shall not be violated," U.S. Const. Amend. IV; or the rule that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. Amend. V. See *Ricketts* v. *Adamson*, 483 U.S. 1, 10 (1987) (double jeopardy rights waivable by pre-trial agreement); see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (voluntary consent to search renders a search lawful under the Fourth Amendment).

Far from supporting the view that Congress enacted a "waiverless rule," Pet. App. 9a, the language of Rules 11(e)(6) and 410 suggests the opposite conclusion. By providing that statements made in plea discussions ordinarily are inadmissible "against the defendant," the Rules indicate that criminal defendants are the intended beneficiaries of their exclusionary provisions. Compare *Evans* v. *Jeff D.*, 475 U.S. at 730-731 (by providing that fees may be recovered by a "prevailing party," 42 U.S.C. 1988

evinces Congress's intent to confer a private right on those parties, which those parties may freely waive); see also *Venegas* v. *Mitchell*, 495 U.S. 82, 88 (1990) (same). Because the exclusionary provisions were enacted "for the protection of the party against whom [the evidence] is * * * to be used," it "is not to be doubted that he may waive them." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872).[1]

The conclusion that the protections of the criminal and evidence rules may be waived by parties is confirmed by the structure of each set of rules, because each set expressly contemplates that a defendant who fails to interpose a contemporaneous and specific objection to a trial ruling ordinarily forfeits his right to challenge that ruling on appeal.

[1] *Shutte* involved a statute passed by the First Congress in order to permit depositions of certain infirm witnesses. See Act of Sept. 24, 1789, ch. 20, § 29-31, 1 Stat. 88-90. The defendant in *Shutte* received notice of a deposition to be taken under that statute, and his counsel attended the deposition without objection. At the trial of the cause (after the witness died), the defendant objected to the admission of the deposition on the ground that it was taken without complying with the statute in several respects, including the fact that the witness did not take the required oath, and that the deposition "was taken before a township justice, and not by any magistrate described in the act of Congress." 82 U.S. (15 Wall.) at 158. This Court agreed with the defendant that "the objections made * * * are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect." *Id.* at 159. But the Court found it "obvious" that the provisions made in the statute were for the benefit of the adverse party, and it concluded that the defendant's conduct in permitting the deposition to occur as it did amounted to a waiver of his rights under the statute, despite his later objection at trial. *Ibid.*

See Fed. R. Evid. 103 (a)(1); Fed. R. Crim. P. 51. That principle of forfeiture is such a fundamental rule of litigation that this Court repeatedly has emphasized that "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). See also *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991).

The court of appeals attempted to reconcile its holding with that settled forfeiture principle by stating that the right it found nonwaivable by contract is forfeited at trial if a defendant fails to object, since a failure to object "implicitly waive[s] the protection." Pet. App. 10a n.4. In opposing certiorari, respondent also suggested that forfeitures that result from a defendant's failure to assert a right at trial should be distinguished from contractual waivers. See Br. in Opp. 2 n.1. But neither respondent nor the court of appeals has explained why it is sensible to believe that Congress intended to allow forfeiture, but to forbid a contractual waiver—*i.e.*, to allow an "implicit[] waiver[]," Pet. App. 10a n.4, but to forbid an explicit one.

Under the Ninth Circuit's analysis, a defendant whose attorney fails to object under Rules 11(e)(6) and 410 to the admission of evidence of plea discussions forfeits any right to claim on appeal that the rules were violated, unless he demonstrates a miscarriage of justice amounting to plain error. See

United States v. *Olano*, 113 S. Ct. at 1779-1781.[2] That is so even though the defendant is not aware of the legal consequences of his counsel's inaction, and even though counsel may not even have realized that there were possible grounds for objection. Yet, under the court of appeals' rule, a defendant is not permitted to agree expressly to the introduction of the same evidence, even when, as here, he has done so knowingly and intelligently after consulting with his counsel. No precedent of this Court supports such an anomalous doctrine.[3]

[2] Under any view of the evidence in a case like this, the defendant has made a criminally false statement with respect to the very subject of his testimony, because he either lied to the prosecutor, see 18 U.S.C. 1001, or committed perjury at trial, see 18 U.S.C. 1621. Making the jury aware that the defendant is a person who lies can only increase the reliability of the verdict. See *Jenkins* v. *Anderson*, 447 U.S 231, 238 (1980). For that reason we doubt that impeaching a defendant with his prior inconsistent statements to the prosecutor could ever meet the plain-error standard.

[3] The court of appeals also suggested (Pet. App. 9a) that the general rule that permits forfeiture of even the most fundamental rights has no application here, because that general rule has been developed by this Court in the course of defining the scope of constitutional rights. That analysis, which respondent embraced at the petition stage (Br. in Opp. 24-25), is doubly flawed. First, as *Olano* demonstrates, the general rule applies not only to constitutional rights, but also to "*right[s] of any other sort*," 113 S. Ct. at 1776 (emphasis added), including those conferred by the Federal Rules of Criminal Procedure. Second, and more fundamentally, the court of appeals' analysis confuses the nature of the right at issue with its waivability. A knowing and intelligent guilty plea, for example, is commonly understood to give rise to a lawful conviction. But the Court has never suggested that that is so because the plea may be viewed as the "trial[] by an impartial jury" that the Sixth Amendment guarantees. Instead, the Court has recognized that a valid plea is a knowing and intentional relinquishment of the defendant's right to have his guilt determined by a jury—*i.e.*, a waiver. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969).

2. The Ninth Circuit's reasoning in this case would have grave consequences for analogous issues under other evidentiary rules. As leading commentators have recognized, "courts give the parties great freedom to waive rules or even to construct new procedures under the doctrine of stipulations," and "[t]here seems to be no reason why this policy should not be extended to the rules of evidence." 21 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5039, at 207 (1977) [hereinafter Wright & Graham, *Federal Practice*]; see also 1 John Henry Wigmore, *Evidence In Trials At Common Law*, § 7a, at 576 (P. Tillers ed. 1983) [hereinafter Wigmore, *Evidence*]("any rule of evidence may be waived during litigation, either by deliberately refraining from invoking its enforcement or by stipulation").[4] In reliance on that principle, parties

[4] Commentators have distinguished between agreements that modify or suspend specific rules of evidence after litigation has commenced (by the filing of a complaint or an indictment), and agreements (almost always in commercial contexts), that create and govern the relationship between the parties, and incidentally provide that a party will waive evidentiary rules or other statutory trial rights in the event litigation ensues. Courts and commentators have on occasion found problematic the latter type of agreement, which is not at issue here, although Wigmore was a strong advocate of its validity. See Wright & Graham, *Federal Practice* § 5039, at 206; see also Wigmore, *Evidence* § 7a, at 559-560.

Agreements of the former type, which are analogous to the post-indictment agreement at issue here, are usually denomi-

frequently stipulate in advance of trial to the qualifications of an expert, to the admission of otherwise privileged documents, or to the admission of a writing that is not the "best evidence" or that does not otherwise comply with the authentication requirements prescribed by the rules. See Fed. R. Evid. 701-703, 501, 1002, 901. See generally Note, *Contracts to Alter the Rules of Evidence*, 46 Harv. L. Rev. 138, 139 (1932); 83 C.J.S., *Stipulations* § 10, at 19 (1953 & Supp. 1993); 73 Am. Jur. 2d, *Stipulations* § 17, at 555-557 (1974 & Supp. 1994).

Agreements that waive the requirements of the hearsay rules with respect to specific evidentiary materials are particularly instructive. Like Rules 11(e)(6) and 410, the hearsay rules categorically provide that certain out-of-court statements are "not

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nated "stipulations," and are almost universally assumed to be valid, even when entered into by counsel without the client's participation or express concurrence. See Wright & Graham, *Federal Practice* § 5039, at 206 ("Although there is little appellate litigation on the limits of the power of the parties to stipulate, the practice is well-defined by custom and should present few problems under the Rules."); see also 83 C.J.S., *Stipulations* § 9, at 11 (1953 & Supp. 1993). Indeed, stipulations are give *more* binding effect than ordinary contracts, because frequently they are enforced even when consideration is lacking. See 83 C.J.S., *Stipulations* § 1, at 2. Because respondent personally agreed to the government's use of his statements for impeachment, and because his agreement was supported by consideration (the commitment of substantial government resources to entering into discussions about a possible cooperation agreement, see pp. 26-27, *infra*), this case does not require the Court to decide the extent to which agreements to vary evidentiary rules may be enforced in the absence of consideration or of the defendant's express concurrence.

admissible." See Fed. R. Evid. 802. Yet it has long been common practice for parties in criminal and civil cases to dispense with a witness's live testimony by agreeing in advance of trial to the testimony that the live witness would have given if called to testify. See 83 C.J.S., *Stipulations* § 10, at 20; 73 Am. Jur. 2d, *Stipulations* § 17, at 556-557. Such a stipulation is analytically indistinguishable from the waiver at issue in this case: It is an agreement to place before the jury the affidavit of the witness, which is "not admissible" otherwise. No court has ever suggested that the hearsay rules categorically forbid that commonplace and sensible device. See *The Sac and Fox Indians*, 220 U.S. 481, 488-489 (1911) (Holmes, J.) ("of course evidence, hearsay or *ex parte*, for instance, may be admitted by consent * * * and then should be given whatever weight it would have but for technical rules").

B. Respondent Has No Valid Defense To Enforcement of His Agreement With The Government

Agreements to vary evidentiary requirements in a pending case are, of course, subject to supervision by the courts (as are plea agreements), and a court therefore has the authority to release a party from his pretrial agreement upon an appropriate showing. See 83 C.J.S., *Stipulations* §§ 34-35, at 88-93. Ordinarily, a party may avoid his pretrial agreement by establishing any well-recognized defense to the enforcement of contractual obligations, such as fraud, mistake, mental incompetency, unconscionability, or

violation of public policy.[5] See *ibid.*; see also 73 Am. Jur. 2d, *Stipulations* § 13, at 548-549. And, quite apart from contractual doctrines of avoidance, a court has discretion to decline even a unilateral waiver of a right by a defendant, when acceptance of the waiver would cast the administration of justice into disrepute. See, *e.g.*, *Wheat* v. *United States*, 486 U.S. 153, 160-162 (1988) (while right to counsel may be waived, court may decline a defendant's waiver of his right to conflict-free counsel, because the conflict of interest

[5] Traditional contract doctrine permits a court to decline enforcement of a fully bargained and otherwise valid agreement if enforcement would violate public policy, as when parties contract for conduct that violates the criminal law. See Restatement (Second) of Contracts ch. 8 (1981); E. Allan Farnsworth, *Contracts* ch. 5 (1982). As this Court recently explained:

> That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

Paperworkers v. *Misco, Inc.*, 484 U.S. 29, 42 (1987). The doctrine, however, voids only contracts that violate "some explicit public policy" that is "well defined and dominant," *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983), and the public policy "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Ibid.* (quoting *Muschany* v. *United States*, 324 U.S. 49, 66 (1945)). See generally G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Calif. L. Rev. 433 (1993) (critical survey of cases raising public policy claims).

could "invite[] disrespect for the integrity of the court"); cf. *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965). Thus, for example, no court would preside over a determination of guilt by crystal ball simply because the defendant was agreeable.

Respondent has never claimed that the government's use of his plea statements to impeach his contrary trial testimony distorted the truth-finding function of a trial in a way that diminishes the public reputation of judicial proceedings. Indeed, it is difficult to imagine how the admission of lawfully obtained evidence that increases the reliability of the verdict could cast the judiciary into disrepute. Nor has respondent ever claimed that anything specific to his circumstances renders his agreement with the government invalid under ordinary principles of contract law; he has made no claim, for example, that the facts of this case give rise to any defense based on fraud, mistake, mental incompetency, or unconscionability. Respondent's sole claim, which the court of appeals accepted, is that an agreement that waives a defendant's rights under Rules 11(e)(6) and 410 is *always* invalid, because it contravenes the public policy favoring plea bargaining.

The public policy defense, however, does not help respondent's cause. To begin with, respondent can derive no persuasive support from cases decided under the Fair Labor Standards Act (FLSA), on which he primarily relies (Br. in Opp. 9). Those cases confirm that "the question of whether [a] statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 705 (1945). In the FLSA setting, the Court has found that Congress

intended to preclude waiver, because the whole point of the Act was to "prevent private contracts" that divested employees of statutory entitlements, such as minimum wages. *Id.* at 706-707. In addition, exceptions to coverage that would result from individual waivers of statutory protections under the FLSA "would affect many more people than those workers directly at issue * * * and would be likely to exert a general downward pressure on wages in competing businesses." *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 302 (1985). Individual waivers of FLSA protections thereby implicate interests of other members of the public.

By contrast, as we have already explained, the language of Rules 11(e)(6) and 410 and basic forfeiture principles establish that those two rules confer purely personal rights that may be waived by a defendant. Respondent has cited nothing in the text, structure, or legislative history of Rules 11(e)(6) and 410 that establishes that the whole point of those rules was to preclude bargaining over the admissibility of plea statements, as distinguished from merely providing a background rule that would govern in the absence of a contrary agreement by the parties. Nor has respondent seriously suggested that a decision by an individual defendant to waive the inadmissibility of his plea statements for impeachment purposes implicates the interests of *other* defendants, or that parties to litigation have a public duty to enforce evidentiary rules, as opposed to a private interest in doing so. Cf. *Town of Newton* v. *Rumery*, 480 U.S. at 395 (waivability of cause of action under 42 U.S.C. 1983 is supported by the fact that the putative plaintiff "had no public duty to institute a [Section] 1983 action

merely to further the public's interest in revealing police misconduct"). In short, whereas the structure and history of the FLSA demonstrate that Congress intended to forbid waivers of rights conferred by that Act, respondent cannot demonstrate that Congress evinced that same intention with respect to the rules at issue here.

Moreover, respondent's argument derives no greater support from more general considerations of public policy, on which the Ninth Circuit heavily relied in reversing respondent's conviction. We do not, of course, disagree with the court's view that public policy favors plea bargaining. See Fed. R. Crim. P. 11(e)(1). The court, however, was wrong to conclude that plea bargaining is hampered by agreements that permit the government to use a defendant's plea statements for the limited purpose of impeaching his later contrary testimony at trial. In addition, the court's conclusion that such agreements are void seriously disserves the public interest in obtaining a defendant's cooperation in the investigation and prosecution of others, see 18 U.S.C. 3553(e) (authority to impose sentence below statutory mandatory minimum to reflect defendant's substantial assistance in the investigation or prosecution of others); *Wade* v. *United States*, 112 S. Ct. 1840 (1992), as well as the compelling public interests in the presentation of truthful evidence in criminal trials and "in having the guilty brought to book." *United States* v. *Blue*, 384 U.S. 251, 255 (1966); see also *Kaufman* v. *United States*, 394 U.S. 217, 240-241 (1969) (Black, J., dissenting).

1. The initial error in the Ninth Circuit's assessment of the relevant public policies flows from its

failure to appreciate the context of respondent's meeting with the prosecutor. The point of that meeting was to permit the prosecutor to assess whether respondent's involvement in drug trafficking had endowed him with information that could be useful in the investigation or prosecution of others—*i.e.*, to weigh the advantages of entering into a cooperation agreement with respondent. That is different from the more traditional role of plea bargaining, which is not primarily to secure evidence against others, but to agree on a charge to which the defendant might plead guilty in order to reduce the expenses and risks that both sides ordinarily incur in a trial of the charges. See *Santobello* v. *New York*, 404 U.S. 257, 261 (1971); see also *Mabry* v. *Johnson*, 467 U.S. 504, 508 & n.8 (1984); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Thus, as one commentator has noted, "deals involving promises to cooperate are sharply different from the general phenomenon of plea bargaining." Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 3 (1992).

The cooperation context has several important consequences. To begin with, in many cases involving cooperation it will be difficult to assess before negotiations are under way whether the defendant's guilty plea will be the subject of bargaining, or whether he instead is interested only in exchanging his cooperation for immunity.[6] Both sides therefore

[6] Discussions about a person's possible cooperation with the authorities overlap only coincidentally with discussions about the possibility of a guilty plea. The possibility of cooperation can arise well before a person has been charged with any crime. When that occurs, defense counsel will frequently offer his client's cooperation to the authorities in exchange for some form of transactional immunity. See generally Larry D. Thompson & Phyllis B. Sumner, *Structuring Informal Immunity*, 8 Crim. Just. 16, 20-21 (Spring 1993) (advising defense bar on how to negotiate with prosecutors in that context). Because prosecutors are often reluctant to strike any immunity bargain without hearing from the putative witness, it is common for a prosecutor to conduct an off-the-record session with the witness and his counsel, pursuant to an agreement that parallels the agreement that respondent made with the government in this case respecting the admissibility of his statements—*i.e.*, providing that statements made by the witness during the interview may not be used in the government's direct case, but may be used "for cross-examination, rebuttal, or as leads to other evidence." *Id.* at 19.

After a person is indicted, it may become harder for him to exchange his cooperation for transactional immunity, because the government has made a prima facie judgment that he was sufficiently involved in the misdeeds under investigation to merit some criminal sanction. He is then more likely to cooperate in exchange for a reduction in sentence pursuant to 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1. Nonetheless, if the prosecutor's need for the defendant's testimony or undercover work is particularly compelling, the defendant may still succeed in obtaining non-statutory transactional immunity, even after the initial charging decision has been made. See generally Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. at 5-6, 13-15.

share a strong interest in agreeing in advance on the consequences that may flow from their meeting, and thereby guard against the possibility that the meeting will later be characterized by a court, with the benefit of hindsight, in a manner that defeats the *ex ante* expectations of one of the parties. An agreement outlining the extent to which the defendant's statements will be admissible at any later trial thus serves the important interest in avoiding

later disputes concerning the nature and purpose of the meeting, and its consequences for admissibility.[7]

In addition, a prosecutor's decision to meet with a defendant and his counsel for the time necessary to evaluate proffered cooperation ordinarily entails a significant commitment of prosecutorial resources, not only for the prosecutor himself, but also for investigative agents who must be present during the

[7] We do not dispute, for purposes of proceedings in this Court, that the meeting between respondent and the prosecutor, as it actually developed, was a "plea discussion[]" within the meaning of Rules 11(e)(6) and 410. Our point is simply that discussions about cooperation may or may not turn out to involve discussions about a plea, and that in the absence of a prior agreement either party might be surprised by how a court later chooses to characterize the discussions. Thus, in one reported case, statements made by a defendant at a conference with the prosecutor were ruled admissible without restriction, because the court found that the meeting was not "a plea bargaining conference but an effort by [the defendant] to convince the government that he was not guilty of any crime." *United States* v. *Cunningham*, 723 F.2d 217, 227-228 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984); see also *United States* v. *Robertson*, 582 F.2d 1356, 1365-1368 (5th Cir. 1978) (en banc) (discussing criteria for distinguishing plea discussions from other discussions under prior version of Rules 11(e)(6) and 410).

Viewed from the perspective of both parties at the time ground rules for the meeting are laid down, the agreement is similar to the settlement of a legal claim that later litigation may or may not prove to be meritorious. See *Town of Newton* v. *Rumery*, 480 U.S. at 395-396 (plurality opinion); *id.* at 399 (O'Connor, J., concurring in judgment). The Ninth Circuit's per se rule against waiver of a defendant's rights under Rules 11(e)(6) and 410 invites wasteful collateral litigation about the proper characterization of such cooperation meetings in specific circumstances.

interview, prison officials who must make the defendant available when he is incarcerated, and foreign language interpreters who must be present when the defendant is not fluent in English. Meetings with a defendant and his counsel to assess proffered cooperation frequently will occupy a day in the schedule of the prosecutor and the law enforcement agents involved, and still more time to check the defendant's story against other leads. Because a prosecutor cannot allocate those resources to every defendant who expresses a possible desire to cooperate with the government, the prosecutor must choose those prospects that are most likely willing to furnish truthful information. The impeachment agreement condemned by the court of appeals provides some assurance that the defendant will take his obligation to give a truthful proffer seriously, and it is an important inducement for the prosecutor's decision to meet with a particular defendant. The Ninth Circuit's decision permits a defendant to obtain the full benefit of his bargain—a commitment of substantial government resources to discussion of a possible cooperation agreement—while being relieved of the burden of complying with his side of the deal.

Finally, and most important, the fact that the information conveyed by the defendant during a discussion about cooperation is intended to be used in other investigations (often including potentially life-threatening undercover work by law enforcement officers) and other prosecutions gives the prosecutor an additional and compelling interest in its veracity that is not present in more traditional plea bargaining situations. A prosecutor often may be unable to judge the value of the defendant's information to other

investigations, or the value of his testimony in other trials, without extensively questioning the defendant as part of "plea discussions" under Rules 11(e)(6) and 410. But the prosecutor may justifiably be unwilling to use the facts proffered by the defendant as the basis for charging or convicting other persons if the defendant wishes to retain the ability to change his story under oath when his own liberty is at stake.[8] It is reasonable for a prosecutor to conclude that a defendant who is willing to cooperate in the prosecution of others only on those terms has little of value to offer to the government. By effectively freeing suspects and criminal defendants to take casually the truth of their statements to the prosecutor, the court of appeals has significantly impaired the government's ability to obtain reliable information from cooperating witnesses.

2. The Ninth Circuit's analysis also reflects little consideration of the untoward incentives that its ruling creates for criminal defendants. Under the court's holding, a defendant will be free to use his proffer of cooperation merely as an opportunity to "try out" a story on the prosecutor. That tactic will permit the defendant to gain the best of all worlds:

[8] If the government lacks effective means of policing the truthfulness of the information proffered by the defendant—such as the protection supplied by the agreement condemned by the court below—the defendant's testimony will be subject to ready impeachment when the government attempts to use it in the prosecution of others. To the extent the cooperator's testimony is nonetheless credited by a jury, the absence of such a necessary check on its veracity may increase the number of instances in which the prosecutor unwittingly presents, and a jury consequently relies on, false testimony—thereby seriously disserving important constitutional values.

favorable treatment if the prosecutor is persuaded, and an opportunity to swear to a different version of the events at his trial (without fear of contradiction and aided by any facts he learns during the proffer session) if the prosecutor is not persuaded.[9] The court of appeals' truncated assessment of the policy considerations that are implicated by a waiver of rights under Rules 11(e)(6) and 410 therefore allows criminal defendants to pervert those rules "into a license to use perjury by way of a defense," *Harris* v. *New York*, 401 U.S. 222, 226 (1971), and "to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976). That result is flatly contrary to the fundamental canon governing interpretation of the Rules of Evidence and Criminal Procedure—*i.e.*, that they "shall be construed to secure fairness in administration * * * to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102; see also Fed. R. Crim. P. 2.

3. The Ninth Circuit's conclusion that plea bargaining will be hampered by a waiver of the rights conferred by Rules 11(e)(6) and 410 is also unsound on

[9] That is exactly what respondent attempted to do in this case. After failing to persuade the prosecutor, respondent not only testified to a completely different version of his involvement in methamphetamine trafficking, but he also took care to admit that he had been present on Shuster's property on the day before his arrest—and thereby attempted to neutralize the surveillance evidence about which he learned during the meeting. Indeed, defense counsel argued in summation that the jury should believe respondent's story because that story was confirmed by the government's own surveillance evidence. Tr. 420.

its own terms. A defendant has no right to a bargained plea, see *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977), and he cannot complain if the government prefers to have his guilt determined by the jury trial to which the Constitution entitles him, *ibid.* Because plea bargaining can occur only if both sides are agreeable, it is illogical to suppose that judicial rulings that make the prosecutor significantly less willing to engage in the plea bargaining process will increase the incidence of its occurrence. It is far more plausible to conclude that plea bargaining will be advanced when the parties themselves are permitted to agree to the terms on which it will be conducted.

The Ninth Circuit attempted to justify its per se rule of non-waivability on the ground that courts must protect "a defendant who is in a weak bargaining position" in order to prevent governmental overreaching. Pet. App. 9a. This Court, however, has always proceeded on the assumption that "the mutuality of advantage," *Bordenkircher* v. *Hayes*, 434 U.S. at 363, inherent in plea bargaining means that "the prosecution and defense * * * arguably possess relatively equal bargaining power." *Id.* at 362 (quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)); see also *United States* v. *Goodwin*, 457 U.S. 368, 377-378 (1982). For that reason, the best protection against the possibility of abuse is the adversarial process of bargaining itself. A defendant who has the assistance of competent counsel, as respondent did, can always deal with practices he regards as abusive by electing to exercise the rights that the prosecutor wishes him to abandon—*i.e.*, by refusing to cooperate with the

government and by insisting on his right to stand trial. See *United States* v. *Goodwin*, 457 U.S. at 378. And if negotiations break down, the defendant is free to go to trial, burdened only by the knowledge that if he testifies inconsistently with his proffer statement, the prosecutor will be free to impeach him with his prior inconsistent statement. That burden does not differ significantly in kind or degree from other factors that a defendant must consider in deciding whether to testify,[10] and it certainly does not make it

[10] A defendant who contemplates testifying in his own behalf is faced with analogous disincentives, which (like the agreement invalidated by the Ninth Circuit) uniformly are intended to further the compelling public interest in the truth-finding function of the trial. Once a defendant takes the stand, he cannot claim his Fifth Amendment privilege to avoid cross-examination on matters reasonably related to the subject of his direct examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958); *Johnson* v. *United States*, 318 U.S. 189, 195 (1943); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900). He may also be impeached by proof of prior convictions, see, *e.g.*, *Marshall* v. *Lonberger*, 459 U.S. 422, 437-438 (1983); *Spencer* v. *Texas*, 385 U.S. 554, 560-561 (1967); Fed. R. Evid. 609, by prior inconsistent statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), see, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, *supra*, by prior inconsistent statements taken in violation of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), see, *e.g.*, *Michigan* v. *Harvey*, 494 U.S. 344, 351-353 (1990), by physical evidence seized in violation of the Fourth Amendment, see, *e.g.*, *United States* v. *Havens*, 446 U.S. 620, 626 (1980), and by general evidence of bias, see, *e.g.*, *United States* v. *Abel*, 469 U.S. 45, 50-51 (1984). He may also open the door to the admission of evidence of prior uncharged wrongs, see, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681 (1988); Fed. R. Evid. 404(b). And if his motion for acquittal at the close of the government's case is denied, he risks bolstering the government's case sufficiently to support

more likely that the trial will produce an unreliable result. Because the parties are free to negotiate over the terms of the waiver, it is difficult to see why the availability of a waiver as one of the options for the parties to bargain over is inherently abusive, or why it warrants the broad per se rule adopted by the Ninth Circuit.

Moreover, as Chief Judge Wallace pointed out (Pet App. 17a-18a), the court's assumption that prosecutors will engage in abusive practices is contrary to this Court's teaching that "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Town of Newton* v. *Rumery*, 480 U.S. 386, 397 (1987); see also *id.* at 395, 396. In light of that understanding, this Court has repeatedly declined to fashion per se rules that outlaw prosecutorial practices merely because of the abstract possibility that abuses may occur in isolated cases. See *id.* at 396-397; *United States* v. *Goodwin*, 457 U.S. at 384. The broad per se rule of non-waivability adopted by the court of appeals is an unwarranted departure from that consistent course of decision.

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an otherwise legally insufficient verdict of guilty. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164 (1954). The possibility that the government may impeach the defendant's trial testimony with plea statements, which only arises if he enters into the agreement with the intent to lie either to the prosecutor or the trial jury, cannot "add[] in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not." *Raffel* v. *United States*, 271 U.S. 494, 499 (1926).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1994

APPENDIX

Rule 102, Fed. R. Evid., provides:

Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 410, Fed. R. Evid., provides:

Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if

the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 2, Fed. R. Crim. P., provides:

Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 11(e)(6), Fed. R. Crim. P., provides:

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a

criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

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No. 93-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner

v.

GARY MEZZANATTO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT, GARY MEZZANATTO

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QUESTION PRESENTED

This case presents the question of whether the government may use its superior bargaining position to extract waivers of the mandatory terms of Rule 410(4) of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure (hereafter "The Rules" or "the plea-statement rules"), rules designed to promote the plea-negotiation process.

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STATEMENT

I. BACKGROUND OF RESPONDENT

Respondent, who is now over forty years old, with a wife and three children, spent most of his life in the area of San Bernardino, Californ' Soon after graduating from high school, respondent served in the military and received special combat awards for his service in the Vietnam war. He remained in the naval reserves until 1978. After leaving the military, respondent worked as an electrician's assistant for approximately nine years. RT 258-260; JA 14-16.[1] Prior to his arrest on August 1, 1991, respondent had no record of criminal history. RT1 19.

II. PLEA-BARGAIN MEETING OF OCTOBER 17, 1991

On October 17, 1991, respondent, accompanied by his trial counsel,[2] met with the prosecuting attorney and two federal agents at the United States Atttorney's Office to engage in a plea-negotiation. RT 290-291, 337, 342, 365-366; JA 39-40, 74, 96-97. Before the meeting, respondent spent only five minutes with his attorney. RT 336-337; JA 74. The prosecution stated, among other things, that if respondent wanted to enter into a plea-discussion with the government, respondent would have to agree that whatever he said during the plea-discussion could be used to impeach any inconsistent testimony at trial, in the event the case proceeded that far. RT 367; JA 97. The meeting lasted approximately forty minutes. RT 370; JA 99-100.

At the beginning of the meeting, respondent said that he was afraid for his life and for the life of his family

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[1] "RT" refers to the reporter's transcripts of the trial proceedings. "RT1" denotes the reporter's transcripts of the post-trial proceedings. "CR" designates the district court's criminal docket sheet. "JA" refers to the Joint Appendix filed before this Court.

[2] At the meeting, respondent was represented by Merle N. Schneidewind, who was replaced by Richard Chier as trial counsel. CR 17, 18.

members. RT 371; JA 101. Pursuant to the government's questions, respondent offered information, implicating him in a drug conspiracy. He stated that he knew that both an individual named "Shuster" and their mutual friend, named "Uncle Bob," were involved in trafficking methamphetamine. Respondent also revealed that he first picked up a brown envelope (which contained methamphetamine) from Uncle Bob, and that this was the first time he had ever delivered a large quantity of methamphetamine. RT 290-294; JA 39-43. Respondent told the prosecutor and the federal agents that he had sold ounces of methamphetamine before and that he was acting as a broker for Shuster. RT 367-368; JA 97-98.

At various times during the meeting, respondent was accused of lying. RT 343-345, 349-351, 368-369; JA 80-81, 84-85, 98-99. At one point, respondent started to leave with his attorney, but then came back and "admitted" that he knew Shuster was manufacturing methamphetamine. RT 368; JA 98-99. After characterizing respondent's statements as "lies," the prosecutor terminated the plea-discussion. RT 345; JA 81.

At trial, respondent took the stand and his incriminating plea-statements were introduced into evidence to impeach his testimony.

SUMMARY OF ARGUMENT

At issue here is the proper interpretation of Rule 410 (4) of the Federal Rules of Evidence and Rule 11(e) (6) of the Federal Rules of Criminal Procedure. The parties agree that the plea-statement rules mean what they say: a plea-statement is not admissible at trial for affirmative or impeachment evidence. The government, however, believes that, despite their plain language, The Rules permit defendants to waive the mandatory terms of The Rules. Respondent now argues that The Justice Department's position is unsound for several reasons:

I. Through the plea-statement rules, Congress intended to create a per se rule of exclusion, barring the admis-

sibility of statements made during a plea-discussion. To effectuate this intent, Congress prefaced The Rules with a conspicuous limiting clause. "Except as otherwise provided in this rule. . ." Other than the two exceptions now listed in The Rules, no other exception, including the government's proposed impeachment or waiver exception, exists within the language or structure of The Rules.

Nor did Congress ever intend to allow the government to circumvent the prohibition of The Rules through waiver agreements. If Congress would have wanted it that way, it would have said so. Many rules and statutes, by contrast, contain clauses enabling parties to reach private agreements, whose terms differ from those of the particular rule or statute. On this score, the government's reliance upon the waiver analysis applicable to constitutional rights is misplaced. The ability of Congress to articulate its rules with precision and frequency sharply distinguishes rules from constitutional rights. The text of the Constitution is virtually unalterable, and for that reason, reading waivers into constitutional rights is essential to ensure the viability of the Constitution. The same is not true for the plea-statement rules, and thus there is no basis to imply waivers in them.

II. The legislative history of The Rules is consistent with their plain language. Time and again, the Justice Department lobbied before Congress for an impeachment exception to the general rule of exclusion. As petitioner has done here, advocates for the Justice Department argued the rationale of *Harris v. New York*, 401 U.S. 222 (1971), claiming that the admission of plea-statements for impeachment was necessary to prevent defendants from lying with impunity. But ultimately, the Justice Department failed to win the support of Congress.

III. Apart from the language and history of The Rules, the public policy interests involved support an absolute prohibition against a waiver or variance of The

Rules. Plea-negotiation is perhaps the most critical phase of the plea-bargain process. As such, the government's waiver scheme chokes off the plea-bargain process at its earliest stage. Further, the government's waiver practice gives rise to prosecutorial abuse—treating a plea-discussion as a full-fledged interrogation. More still, the Justice Department's claim that the waiver requirement is a needed "weapon" to supplement the prosecution's "arsenal" is overstated. Under the present system, there are many existing mechanisms, designed to discourage untruthful proffer statements.

IV. Finally, the government's proffer agreements constitute impermissible extra-judicial agreements. Drawing upon a very general theory of trial stipulations, the government here maintains that parties should be allowed to vary the mandatory terms of these or any rules of evidence. In making this argument, the government confuses the distinction between a forfeiture and a true waiver. Stipulations, untimely objections, invited errors and the like are all classed as forfeitures. The forfeiture analysis assumes an error has been committed, and the only outstanding question is whether an aggrieved party can effectively argue the error on review. Express waivers which are made before trial, like the Justice Department's proffer agreements, are completely different from forfeitures. In this case, the government must establish that the proffer agreement is, in the first instance, a permissible procedure. Respondent maintains it is not.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE RULES PRECLUDES READING INTO THE RULES AN IMPLIED WAIVER PROVISION.

The government argues that there is "no support in the text of Rules 11(e)(6) and 410" for barring defendants from waiving the plea-statement rules. Brief for U.S., at 8. Respondent disagrees, and maintains that Congress used specific textual devices to ensure that the terms of The Rules would not be varied or excepted.

A. Limiting Language.

As with a statute, this Court looks first to the text of a rule to determine its meaning. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987). Rules 11(e)(6) and 410 read, in relevant part: "*Except as otherwise provided in this rule*, evidence of [plea-statements] *is not*, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions. . ." (italics added). Congress included two exceptions within The Rules' exclusionary operation. They read: "However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

The language, structure and overall intent of The Rules could not be clearer. The Rules set forth a categorical rule of exclusion of all plea-statements, "*except as otherwise provided in this rule.*" (Italics added). The Rules then list the two exceptions to their general application. These exceptions are exclusive as defined by the limiting language of The Rules. *Crosby v. United States*, —— U.S. ——; 113 S.Ct. 748, 751 (1993).

In *Crosby*, for example, the Court held that same limiting language prevented the government from reading more waiver exceptions into the presence requirement under Rule 43 of the Rules of Criminal Procedure than were express in the terms of the rule. *United States v. Robinson*, 361 U.S. 220, 224-225 (1959) (same limiting language). As to the plea-statement rules, on their face they do not provide an impeachment or waiver exception to the general rule of exclusion.[3] This omission is fundamental; for the Justice Department must necessarily argue that an implied waiver exception exists within the language or structure of The Rules themselves, an interpretation contrary to their explicit limiting language.

B. Mandatory Nature of The Rules.

Respondent maintains that the plea-statement rules were written in absolute, mandatory terms. A mandatory rule, by definition, leaves no discretion to the parties; its terms are absolute and must be followed, unless the rule itself provides otherwise. Cf. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The government agrees that The Rules are mandatory in a limited sense: "Thus, the rules are 'mandatory' only in the sense that they preclude certain conduct by the government *in the absence of the defendant's agreement*." Brief for U.S., at 13; *id.* at 23. In essence, the government believes The Rules contain an implied waiver provision. But this interpretation finds no textual support; Congress knows how to promulgate and amend rules to enable parties to agree upon their own terms of admissibility.

To illustrate, compare § 1B1.8 of the Federal Sentencing Guidelines to Rules 11(e)(6) and 410. § 1B1.8 sets forth the rule of admissibility at a sentencing proceeding concerning statements made pursuant to a cooperation

[3] In fact, as later explained, Congress specifically rejected the Justice Department's proposed impeachment exception. *Infra* at 17-19.

agreement. In particular, this measure lays down a general rule of admissibility, but provides that the government may agree to alter this rule: "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used. . ." U.S.S.G. § 1B1.8(a).

Thus, in § 1B1.8, Congress contemplated parties reaching agreements, varying the general rule of admissibility. The absence of any smilar enabling clause in Rules 11(e)(6) and 410, the counterpart to § 1B1.8,[4] demonstrates that Congress never intended to allow parties to enter into private agreements to vary the rules of admissibility at a trial proceeding.[5] See, *Leatherman v. Tarrant County Narcotics Unit*, —— U.S. ——; 113 S.Ct. 1160, 1163 (1993) (expressio unius est exclusio alterius).

Stated differently, Congress knew how to provide the authority for the making of private (waiver) agreements, but chose not to promulgate or amend the plea-statement rules to accommodate such agreements. *United States v. Singer*, 380 U.S. 24, 36-37 (1964) ("the framers of the

[4] The Sentencing Commission was obviously sensitive to the interplay between the plea-statement rules and § 1B1.8. See, U.S.S.G. § 1B1.8, comm. n. 3 ("In the event no agreement is reached, use of information in a sentencing hearing is restricted by Rule 11(e)(6).").

[5] Rules 11(e)(6) and 410 appear to overlap § 1B1.8 as The Rules bar the admissibility of plea-statements "in any civil or criminal proceeding." A sentencing hearing is clearly a "criminal proceeding." However, § 1101(d)(3) of the Federal Rules of Evidence excludes the application of the rules of evidence at the sentencing stage of a criminal proceeding. For this and other reasons, the Court of Appeals in *United States v. Ruminer*, 786 F.2d 381, 385-387 (10th Cir. 1986) held that the plea-statement rules do not apply at the sentencing stage.

federal rules were aware of possible alternatives when they recommended the present rules to this Court . . . this Court promulgated the rules as recommended; and Congress can be deemed to have adopted it. . ."). Indeed, by contrast, there are numerous examples where Congress either directly, or by delegation, has enacted legislation or promulgated rules which enable parties to reach private agreements. E.g., Sup. Ct. Rule 26.2 ("In the absence of agreement. . ."); Fed. App. Rule Proc. 28 (h) ("unless the parties otherwise agree. . ."); Fed. App. Rule Proc. 30(b) ("In the absence of agreement. . ." [¶] "Unless the parties otherwise agree. . ."); Fed. App. Rule Proc. 34(d) (similar language) 5 U.S.C. § 579(d) ("unless the parties agree otherwise. . ."); 12 C.F.R. § 263.25(b) ("unless the parties agree otherwise. . ."); 22 U.S.C. § 4110(c)(3) (same language); 36 U.S.C. § 395(B) ("unless the parties to the proceeding mutually agree. . ."); 38 U.S.C. § 8502(b) ("unless the parties otherwise agree. . ."); 46 U.S.C. § 1707(c) ("unless the parties otherwise agree. . .").

Taking a slightly different approach, the government maintains that, by specifically drafting The Rules to preclude the admission of plea-statements "against the defendant," Congress intended to confer a private right on the defendant in the same way certain statutes confer personal rights upon individuals. On this analogy, the Justice Department believes that, just like these statutory rights, the plea-statement rules should be waivable. Brief of U.S., at 13-14. The government, however, misunderstands the meaning and purpose of this limiting clause.[6]

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[6] The government's position necessarily argues for a group of waivable mandatory rules. Indeed, the Justice Department's argument begs the question whether the prosecution may require waivers of the procedural protections of the alibi defense or of the insanity defense as a condition of a plea-negotiation. See, Fed. R. Crim. Proc. 12.1(f) ("Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not, in any civil or criminal proceeding, admissible *against the person* who gave notice of the intention.", italics added); Fed. R. Crim. Proc. 12.2(e) ("Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible *against the person* who gave notice of the intention.", italics added). The plain language of these rules clearly prohibits it. Why should the plea-statement rules be treated any differently? If anything, the limiting language of The Rules, "except as otherwise provided in this rule," provides additional support for prohibiting any variance of The Rules' mandatory procedures.

Again, if Congress wanted to allow parties to waive or vary the mandatory procedures of these or similar rules, it would have said so. Rule 17.1 of the Federal Rules of Criminal Procedure provides a good example. Rule 17.1 sets forth the general rule of non-admissibility for statements made by a defendant during a pre-trial conference. Congress, however, provided that the defendant may agree to vary this rule of exclusion, but only if certain procedures are followed. See, Fed. R. Crim. Proc. 17.1 ("No admissions made by the defendant or his attorney at the [pre-trial] conference shall be used *against the defendant, unless the admissions are reduced to writing and signed by the defendant and his attorney.*", italics added).

This wording, "against the defendant," was incorporated into The Rules to limit the rule of non-admissibility to the accused only. Third parties were not to come within its operation. Congress believed that this more limited application was consistent with The Rules' primary aim of creating an open and unrestrained atmosphere for plea-discussions:

> "Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use *for or against other persons* will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. . . ."

Notes of Advisory Committee on Proposed Rules, reprinted in 28 U.S.C.A. Rule 410, at 353, italics added. Hence, this limiting language does not define the nature of The Rules (personal right or mandatory rule), but instead operates as a limitation on their application. See,

Crosby v. United States, supra, 113 S.Ct. 748 (limiting language analysis). Viewed from this perspective, the plea-statement rules do not confer rights upon the defendant; nor do The Rules belong to the defendant any more than they belong to the government or to the courts.[7]

Thus, the government's reliance upon this language is wholly misplaced. This becomes even more apparent when we examine the language in a broader context. Rule 11(e), for instance, the provision controlling the plea-agreement procedure, refers to the defendant by name in several places.[8] Yet, these mandatory rules of procedure could hardly be described as personal and private rights. Rather, these provisions, in conjunction with the plea-statements rules and the other Rule 11 measures, are "the method chosen by Congress" to achieve certain objectives of the plea-bargain process. See, *United States v. Crook,* 526 F.2d 708, 710 (5th Cir. 1976); Notes of

[7] The public and institutional purpose of the plea-statement rules sharply distinguishes them from § 1983 and other civil rights actions. See, Brief for U.S. at 13-14. § 1983, for example, confers upon individuals a personal right to bring civil rights claims, and thus these actions are waivable. See, *Venegas v. Mitchell,* 495 U.S. 82, 88 (1990) ("A cause of action under § 1983 belongs 'to the injured individua[l],' (citation), and in at least some circumstances that individual's voluntary waiver of a § 1983 cause of action may be valid."). The Rules, on the other hand, are mandatory and self-executing rules of procedure.

[8] It is true that the other Rule 11 provisions are not rules of exclusion. But this difference is less important than their similarity. All Rule 11 provisions make up a single unitary and integrated scheme to ensure procedural fairness to the defendant throughout the course of the plea-bargain process. This continuum covers the plea-negotiation, the plea-agreement and the guilty-plea phases of the process. Thus, the plea-statement rules are no more waivable than are the other indispensable measures of the Rule 11 plea structure. See, *Brooklyn Bank v. O'Neil,* 423 U.S. 697, 711-712 (1944) (even Congressional rejection of anti-waiver bill still did not permit waivers of different provisions of the Fair Labors Standard Act because of the Act's integrated and unitary structure).

Advisory Committee (1983 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 363.[9]

C. Constitutional Rights v. Mandatory Rules.

The Justice Department maintains that the terms of the plea-statement rules are no more mandatory than those of constitutional rights. Brief for U.S., at 13. For this reason, the government claims, The Rules, like constitutional rights, should be waivable. Long ago, however, a defendant's constitutional rights were seen to have a distinct personal nature, existing strictly for the benefit of the defendant, and therefore waivable by him. *United States v. Gill,* 55 F.2d 399 (1931); *Barkman v. Sanford,* 162 F.2d 592 (5th Cir. 1947); see, *Smith v. United States,* 360 U.S. 1, n.4 (1958) (*Barkman* and *Gill* analysis followed).

In *Gill, supra,* 55 F.2d 399, the court considered whether the defendant could waive the Fifth Amendment provision that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The defendant argued that he could not because, unlike the language of other constitutional rights, the terms of the Grand Jury provision are mandatory. Quoting the analysis of earlier cases, the *Gill* court reasoned that the nature of constitutional rights, rather than their plain language, controls:

> " 'But it is insisted that if the accused may waive his right to a trial by jury, he cannot, by his consent, dispense with a presentment or indictment by a grand jury. The argument is based on the difference in the language of the two provisions. It is true that the

[9] This does not mean, of course, that a "variance from the procedures required [by the plea-statement rules]" constitutes per se reversible error. See, Fed. R. Crim. P. 11(h). But it is error, and if preserved by timely objection, must be reviewed for harmless error. See, *United States v. Olano,* —— U.S ——; 113 S.Ct. 1770, 1778 (1993).

> language in the provision securing trial by jury is expressive of an intention to confer a right, and the language in the other provision, with respect to a presentment or indictment, is prohibitory in the form of expression. But, nevertheless, both these provisions are classified under the title of "Rights and Privileges," and among the rights and privileges enumerated in the constitution. The form of expression in which the constitutional guaranty of the rights and privileges to which these two paragraphs relate are declared, does not alter or affect the nature of either."

Id. at 401.

The constitutional waiver analysis, however, does not apply to the plea-statement rules. Rules 11(e)(6) and 410, for example, were not promulgated principally for the defendant, although they do benefit him. Rather, the plea-statement rules have a larger and more independent public purpose—to promote and administrate the plea-negotiation process.[10] See, *United States v. Olano, supra*, 113 S.Ct. at 1782 (conc. opn., J. Kennedy) ("there are good reasons to suppose that Federal Rule of Criminal Procedure 24(c) is the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties."); cf. *United States v. Smith*, 360 U.S. 1, 10 (1958) ("Under our view of Rule 7(a) [of the Rules of Criminal Procedure], the United States Attorney did not have authority to file an information in this case and the waivers made by petitioner were not binding and did not confer power on the convicting court to hear the case."); *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992) (Speedy Trial Act non-waivable because of its public importance). Stated differently, The Rules are not so much "rights" as they are rules to "guarantee fair procedure." Appendix 9a.

[10] See, *United States v. Davis*, 617 F.2d 677, 683 (D.C. Cir. 1979); *Rachlin v. United States*, 723 F.2d 1373, 1376 (8th Cir. 1983).

In this case, Judge Sneed observed that the government's comparison of the plea-statement rules to constitutional rights was "a false equality." Appendix 9a. On this, he further explained:

> "Judicially created waivers of the latter are the result of an inescapable feature of the courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. Given the *precision with which these rules are generally phrased*, the comparative recentness of their promulgation, and the *relative ease with which they are amended*, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule."

Ibid., italics added.

Judge Sneed's analysis makes explicit what is an intuitively obvious distinction between constitutional rights and procedural rules. Whereas rules may be promulgated and amended to meet the needs of the moment, the text of the Constitution is essentially unalterable. Waivers are therefore one of the Court's interpretive means to give the Constitution continuing viability. Cf. *Opp Cotton Mills, Inc. v. Administration of the Wage, et al.*, 312 U.S. 126, 145 (1940) ("The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or impracticable."); see, *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1988) ("*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes."). In contrast, rules, even more so than statutes, are easily promulgated and amended, as the rule-making process is not subject to the Presidential veto power. Cf., *Touby v. United States*, —— U.S. ——; 111 S.Ct. 1752, 1757 (1991). Hence, in its rules, Con-

gress has the ability to articulate all that it wants, virtually anytime that it wants, through the use of precise contemporary legal language and through the ever-dynamic rule-making process.

A comparison between the judicially-created exclusionary rule and the plea-statement rules helps illustrate this point. The Justice Department and the Dissenting Opinion below maintain that the government's waiver policy is necessary to prevent the defendant from lying, from exercising what they call "the 'right' to lie." Pet. Cert., at 11-12; Appendix, 14a; Brief for U.S., at 11, 29. This argument proceeds on the rationale of *Harris v. New York*, 401 U.S. 222, 226 (1971); that to bar impeachment "allows defendants to pervert those rules 'into a license to use perjury by way of a defense,' (citation), and 'to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge.' (Citation.)." Brief for U.S., at 29. For important reasons, however, the Justice Department's waiver scheme may not serve as a surrogate for the *Harris* principle.

The rule of *Harris* is one of the exceptions to the exclusionary rule under *Miranda v. Arizona*, 384 U.S. 436 (1965). See, *United States v. Leon*, 468 U.S. 897, 910 (1984). The exclusionary rule itself is not authorized by the Constitution, but rather is " 'a judicially created remedy designed to safeguard Fourth [Fifth, and Sixth] Amendment rights generally through its deterrent effect. . .' " *Leon, supra*, 468 U.S. at 906, quoting from *United States v. Calandra*, 414 U.S. 338, 348 (1974). Because of its judicial nature, the exclusionary rule has developed by this Court's ongoing balance of two opposing values—the need to deter unlawful police practices and the competing interest to punish the guilty. *Id.* at 909-913.

The plea-statement rules, on the other hand, come from Congress and are meant to establish absolute procedures for the exclusion and admission of plea-statements. This distinction between the fluid nature of judicially-created

rules and the fixed character of legislative rules is critical. Once a statute or legislative rule becomes law, the balance of the various interests has already been struck. There is nothing more for the court or the parties to do but follow its terms. See, *West Virginia University Hospitals Inc. v. Casey, Governor of Pennsylvania*, 499 U.S. 83, 99 (1991).

Consider, for example, the difference between the Sixth Amendment right to a Speedy Trial and the Speedy Trial Act. In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court was asked to define specific time frames for determining a violation of the Sixth Amendment right to a Speedy Trial. The Court declined, stating:

> "The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered at trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right. . . .
>
> "But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be *less precise*."

Id. at 523, italics added.

Congress took this cue and enacted the Speedy Trial Act. 18 U.S.C. § 3161; see, *United States v. Taylor*, 487 U.S. 306, 341 n.12 (1987). This Act sets forth

precise time limits for trying criminal cases. Its time-provisions are mandatory and non-waivable. See, *United States v. Willis, supra*, 958 F.2d at 63.[11] In the same sense, The Rules are quite specific, and they are mandatory. They set forth the necessary conditions for a statement to come within the protections of The Rules. Fed. R. Crim. P. 11(e)(6)(D). They also provide two exceptions to the exclusionary principle. Beyond this, Congress did not provide for any other exceptions to, or waivers of, The Rules' application. See, *Crosby v. United States, supra*, 113 S.Ct. at 751 (Rule 43 of the Rules of Criminal Procedure sets forth list of waivers, none are implied).

II. THE HISTORY OF THE RULES MAKES CLEAR THAT CONGRESS DID NOT INTEND TO PERMIT THE GOVERNMENT TO SEEK WAIVERS OF THE RULES' PROTECTIONS.

So far, respondent has contended that the language of The Rules fails to support the government's argument in favor of an implied waiver exception. Respondent now maintains that the legislative history of The Rules confirms what their plain language makes clear.

By its legislative powers under Article I, section 1 of the United States Constitution, Congress enacted the Rules Enabling Act, 28 U.S.C. § 2072. This Act delegates most of the federal rule-making authority to the Supreme Court, see *Business Guides v. Chromatic Comm. Ent.*, 498 U.S. 533, 552 (1991), but ultimately all rules are reviewed and approved by Congress. 28 U.S.C. § 2074; *United States v. Abel*, 469 U.S. 45, 49 (1984). Rule 11 of the Federal Rules of Criminal Procedure comes from this Act, and its overall design is to ensure the fairness and adequacy of the plea and plea-bargain process. See, *McCarthy v. United States*, 394 U.S. 459, 465-466 (1969).

[11] Congress, however, contemplated waivers of the remedy of a violation of the Act. 18 U.S.C. § 3162(a)(2).

In 1975, Rule 410 and 11(e)(6) became a part of this effort. Cf. *Roadway Express, Inc. v. Piper et al.*, 447 U.S. 752, 760-761 (1979) (integrated provision of an Act must be read with common legislative purpose in mind to maintain uniform structure). Their primary objective "is to permit the unrestrained candor which produces effective plea discussions. . ." Notes of Conference Committee (1979 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 355; see, *United States v. Grant*, 622 F.2d 308, 312 (8th Cir. 1980); see Federal Rules of Criminal Procedure, Hearings Before the Committee on the Judiciary, United States Senate, 94th Congress, Sess. 152 (1975) (Statement of Wayne R. LaFave, reporter, Advisory Committee on Criminal Rules).

More than anything, the history of The Rules reveals a stark conflict between Congress and the Justice Department.[12] From the beginning, the Justice Department pressed hard for an impeachment exception to The Rules' exclusionary application. 23 Charles A. Wright & Kenneth W. Graham, Jr. Federal Practice and Procedure, (1977), § 5341, at 334-338, 345-346; 2 David W. Louisell & Christopher B. Mueller, Federal Evidence, § 184, at 509-518. Through its principal proponent, Senator John McClellan, the Justice Department began its campaign to create an impeachment exception to the general rule of exclusion for Rule 410.[13] This proposed ex-

[12] It appears that the government's campaign to provide for the use of plea-statements for impeachment was wholly instigated by the Justice Department. 23 Wright, Fed. Prac. & Proc., *supra*, § 5341, at 343 ("if the collected responses of U.S. Attorneys throughout the country that were submitted by the Department are any indication, the admissibility of statements made in connection with pleas and offer to plead was of comparatively little concern to most federal prosecutors").

[13] The exclusionary principle of the plea-statement rules was originally proposed in Rule 410 in 1969. See, 2 Louisell, Fed. Evid., *supra*, § 184, at 509. It was not until 1974, when it was proposed in Rule 11(e)(6). *Id.* § 184, at 513.

ception was meant to apply to a defendant's statements made on-the-record in connection with a plea or offer to plea, in the presence of defense counsel. The Rules' Advisory Committee, however, quickly rejected the Department's first attempt. Yet, as a compromise, the plea-statement rules were modified so that statements would be inadmissible against the defendant only. 23 Wright, Fed. Prac. & Proc., *supra*, § 534, at 336.

This, and other changes, however, did not satisfy the Justice Department. Next, Deputy Attorney General Kleindiest corresponded to the Chief Justice of the Supreme Court, claiming that the admission of plea-statements for impeachment fell within the rationale of *Harris v. New York*, *supra*, 401 U.S. 222, and that, without this exception, defendants would be permitted to lie with impunity. See, 23 Wright, Fed. Prac. & Proc., *supra*, § 5341, at 334-335, 337, n.9, n.18. Even so, the Advisory Committee recommended that no changes be made in The Rules, and the Supreme Court adopted the Committee's recommendation. *Id.* at 336-337.

The Justice Department continued the battle. At the House hearings, the Justice Department offered a "new proposal" to the recommended draft of Rule 410. Relying again upon the rationale of *Harris v. New York*, *supra*, 401 U.S. 222, the Department argued that a defendant is under a continuing obligation to testify truthfully, and therefore, the plea-statement rules should conform to this impeachment principle. Once again, the impeachment proposal was rejected. 23 Wright, Fed. Prac. & Proc., *supra*, § 5341, at 338-339, & n.26. Having no success with the House, the Justice Department took its case to the Senate hearings. In modified form, the Senate adopted the Department's impeachment exception. But the House Conference Committee refused to accept the Senate's version.

To delay the final decision on the matter, the Conference Committee agreed to postpone the effective date of

Rule 410, until the same issues could be resolved during the promulgation of Rule 11(e)(6). *Id.* at 340-341. At these House hearings, the Justice Department made similar arguments in favor of the impeachment proposal. But, as in the case of Rule 410, the Justice Department lost its bid for the impeachment exception to Rule 11 (e)(6). *Id.* at 344-346.[14] Given this history, it is hard to imagine that Congress would have ever wanted the government to do by indirection what Congress clearly prohibited by the plea-statement rules themselves. To the extent that the government still believes The Rules are inadequate, the Justice Department should once again turn to Congress, not to this Court, for assistance. *United States v. Mississippi Valley*, 364 U.S. 520, 565 (1960); *NLRB v. Health Care & Retirement Corp. of America*, —— U.S. ——; 114 S.Ct. 1778, 1780 (1994) (Court does not create exceptions to the plain language of statutory Acts, but Congress can and does).

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[14] The two exceptions to the per se rule of exclusion appear to be compromises to the Justice Department's efforts. Congress approved Rules 11(e)(6)(ii) and Rule 410(ii), which permit the use of a plea-statement for a perjury or false statement prosecution. This narrow exception posed a potentially serious impediment to open and candid plea discussion, and The Rules' Judiciary Committee knew it: "The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. . . ." See, Notes of Committee on the Judiciary (1975 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 353-354.

The second exception was proposed in 1979, and allows for the introduction of a plea-statement at trial to clarify a previously received plea-statement, which was introduced under circumstances not prohibited by The Rules. See, Notes of Conference Committee (1979 Amendment), reprinted at 18 U.S.C.A. Rule 11, at 356. This exception prevents the defendant from unfairly exploiting the application of The Rules by admitting evidence of only part of a plea-discussion. This exception is consistent with the broader objective of promoting fair procedure within the criminal justice system.

But the greatest irony of the government's present argument is that it goes against the very position the Justice Department originally took during the promulgation of The Rules. The Justice Department's several rejected proposals to allow plea-statements for impeachment at trial were never meant to apply to off-the-record plea discussions. Rather, the Justice Department's proposed impeachment exception was intended only for on-the-record, open plea-statements. In fact, during the Congressional hearings, representatives of the Department of Justice conceded that informal plea-discussions should not be used to impeach a defendant's trial testimony. See, Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States House of Representatives, 93rd Congress 2d Sess. at 44 (1975) (Statement of W. Vincent Rakestraw, Assistant Attorney General, Legislative Affairs); See also, *Id.* at 78 (Statement of Earl J. Silbert, D.C.). Thus, through its proffer agreements, the Justice Department now seeks to accomplish what it clearly dismissed out of hand during the promulgation of The Rules.

III. PUBLIC POLICY OF THE RULES PRECLUDES PERMITTING WAIVERS OF THE IMPEACHMENT PROTECTION.

A. Purpose of The Rules.

Plea-bargaining, of course, begins with off-the-record discussions between the defendant, his attorney and the prosecutor. In the federal system, prosecutors generally require a "proffer" [15] from the defendant. As one commentator explained, this stage of the plea-bargain process is especially critical and sensitive:

> "This stage is a delicate dance in which the witness must seek to persuade the government that what he has to offer is worth immunity or leniency while, at the same time, *not irretrievably incriminating himself.* These early negotiations may occur through use of a formal proffer or they may take place in a series of informal meetings between the witness and government agents or prosecutors."

italics added, G. Hughes, 45 Vanderbilt Law Review 1, 41 (1992), "Agreements for Cooperation in Criminal Cases."

Congress believed that this "delicate dance" could best be accommodated by striking a fine balance: excluding plea-statements offered for affirmative or impeachment evidence at trial on the one hand, yet permitting their use under different circumstances on the other. In this way, plea-bargaining would find a prominent, yet *managed,* role in the criminal justice system. That is what is meant by the "public policy" of The Rules. Under this analysis, the Court does not balance the general equities to reach what is regarded as a "just result." Cf. *United States v. Taylor, supra,* 487 U.S. at 338, n.9 (1987) ("Although we realize it would be tempting to wrap up the 'equities' in a single package and, with the best of intentions, effect what could be regarded as an essentially just result, we could not condone an approach that would violate the right of defendants and misapply the Speedy Trial Act in the hope that the errors would balance out in the end.").

Rather, the Court looks to the specific public interest contemplated by the legislature. See, *Brooklyn Bank v. O'Neil,* 324 U.S. 697, 705 (1944) ("the question of whether the statutory right may be waived depends upon

[15] As its name implies, a proffer describes the defendant's offer of information to the government. This offer is made by the defendant in the hope that he will ultimately receive some consideration for his information and cooperation. The term "proffer agreement," as used here, defines a more specific type of proffer discussion, requiring the defendant to waive the impeachment protection of The Rules. See, Larry D. Thompson & Phyllis B. Sumner, "Structuring Informal Immunity," 8 Criminal Justice 17, 19 (Spring 1993).

the intention of Congress manifested in the particular statute"); *Central Bank of Denver N.A. v. First Interstate Bank of Denver*, —— U.S. ——; 114 S.Ct. 1439, 1448 (1994) ("The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute."). The court below followed the same specific public policy analysis, and held: "Allowing a waiver of these rules would contravene and thwart the policy—efficient case resolution through plea bargaining—these rules were designed to effectuate." Appendix 7a, n.3.[16]

The Justice Department, nevertheless, offers its own rationale in favor of the waiver scheme. On one level, the government asserts, barring waivers of The Rules will have the effect of deterring plea-bargaining. This is so, the argument goes, because prosecutors will be unable to ensure the veracity of a defendant's plea-statements, and will thus have no incentive to engage in plea-negotiations. See, Petition for Rehearing with Suggestion for Rehearing en Banc, at 11-12; Brief for U.S. at 30. On this logic, the government argues that its proffer

[16] For this reason, the analysis of *United States v. Dortch*, 5 F.3d 1056 (7th Cir. 1993) is wide of the mark. There, the court upheld proffer agreements, because, in large part, they promote the "laudable policy encouraging defendants to tell the truth during both plea negotiations and subsequent trials." *Id.* at 1069. Yet, the principal aim of the plea-statement rules is to foster settlement negotiations, not to advance the fact-finding process. See, *United States v. Davis*, 617 F.2d 677, 683 (D.C. Cir. 1979) ("Congress, when it considered the provision, suggested that absent such a shield the possibility of self-incrimination would 'discourage defendants from being completely candid and open during plea negotiations . . .' (Citation)"); *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977) ("If we permit the facts concerning a plea bargain to be brought out in evidence, we will have silence on the part of every knowledgeable accused. Discussion will not be worth the price of the potential bargain.").

agreements promote plea-bargaining.[17] Petition for Rehearing, *supra*, at 10-11. The government, of course, is free to prosecute criminal cases as it sees fit. *Newton v. Rumery*, 480 U.S. 386, 396 (1986) ("Our decisions in those cases uniformly have recognized that courts normally must defer to prosecutorial decisions to whom to prosecute"). But its peculiar rationale for promoting plea-bargaining must remain its own; Congress has already rejected it. See, 23 Wright, Federal Practice and Procedure, *supra*, § 5341, at 337, n.18, 19; *Id.* § 5341, at 345; *United States v. Wood*, 879 F.2d 927, 936-937 (D.C. Cir. 1989) ("In considering these rules, Congress had debated and rejected proposals that statements made in connection with an offer to plead guilty be available for impeachment purposes.").

Examining this further, the government's waiver proposition throws in an added complication to the plea-bargain process. As Justice O'Connor put it, "The legitimacy of plea bargaining depends in large measure upon eliminating extraneous considerations from the process. (Citation)." *Newton v. Rumery, supra*, 480 U.S. at 400 (conc. opn., J. O'Connor); *United States v. Lawson*, 683 F.2d 688, 692 (2d Cir. 1982) ("Calculations as to use for impeachment purposes will clearly affect the discussions and impair the frank and open atmosphere Rules 410 and 11(e)(6) were designed to foster."). By transposing the rationale and holding of *Harris v. New York, supra*, 401 U.S. 222, onto its proffer agreements, the government has "created exactly the problems Congress sought to avoid." Cf. *Sedima, S.P.R.L. v. IMREX Co.*, 473 U.S. 479, 499 (1984).

[17] Common sense, alone, tells us that the waiver requirement acts as a brake, not as a facilitator, to the plea-bargain process. Undoubtedly, requiring a defendant to waive the impeachment protection of The Rules before he even begins discussing the case with the government would make any defendant think twice about engaging in a plea-negotiaton.

Seen from a different perspective, the government's waiver policy discourages the defendant from providing the most reliable proffer information. The very best information, information bearing the most indicia of reliability, is based upon a defendant's personal involvement and association with the criminal conduct under investigation. Thus, the most helpful proffer is necessarily that which incriminates or implicates the defendant in the suspected criminal activity. To allow the government to set up a scheme where a defendant must reveal his "best information" to obtain consideration for his cooperation, and where the prosecution may later exploit any inconsistencies in the proffer, at trial, undermines the entire cooperation effort. See, *infra* at 32-35. This much was pointed out by Judge Sneed in his opinion below:

> "For instance, prosecutors of those engaged in criminal conspiracies desire the fullest cooperation of those accused of participation therein. Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted. Rules 11(e)(6) and 410(4) aid in obtaining this cooperation. A lesser member of the conspiracy will more freely provide useful information to the prosecution if he knows that none of his statements in the plea bargaining session can be used against him."

Appendix, 6a; see, *Williamson v. United States*, —— U.S. ——; 62 U.S.L.W. 4639, 4642 (1994) ("Small fish in a big conspiracy often get shorter sentences than people who are running the whole show . . . especially if the small fish are willing to help the authorities catch the big ones . . .").

Under the waiver requirement, however, a defendant will have every incentive to reveal as little as possible about individuals and events which incriminate him. Assuming the government truly desires the best information about others involved in the crime, the proffer

agreement, in a very real sense, is a self-defeating proposition for the government's investigative interests and for the larger congressional and societal interests involved. See, Notes of Judiciary Committee (1975 Amendment), reprinted in 18 U.S.C.A. Rule 11, at 353 (Rule 11(e) intended to encourage cooperation agreements).

And, even if this Court were to evaluate the government's waiver rule under a more generalized equity analysis, would the government's argument fare any better? Given the Justice Department's superior bargaining position—"[t]he coercive power of criminal process" [18]—is it fair to make a defendant wager his defense upon a throw of the dice with the government's "debriefing" [19] session, this without any assurance of a benefit in return? What a "price" to pay, observed Judge Sneed, "for the opportunity to enter into discussion that could have, but did not, lead to a plea bargain." Appendix, 9a. It is a poor bet indeed, a serious "roadblock" for many defendants who would otherwise freely engage in plea-bargaining. See, *United States v. Levy*, 578 F.2d 896, 901 (2d Cir. 1978); *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977) ("If we permit the facts concerning a plea bargain to be brought out in evidence, we will have silence on the part of every knowledgeable accused. Discussion will not be worth the price of the potential bargain.").

And, what is more, should defendants, like respondent, who agree to cooperate with the government, be required to jeopardize their defense in order to substantially assist the government in its investigations? Set against the extensive penalties compelled by the mandatory minimum sentencing laws and the Federal Sentencing Guideline,

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[18] *Newton v. Rumery*, *supra*, 480 U.S. at 400 (conc. opn., J. O'Connor).

[19] See, RT 358; JA 90.

the waiver requirement is inherently unfair and coercive. See, R.T. 340; J.A. 77 (ten-year mandatory minimum); *Newton v. Rumery, supra,* 480 U.S. at 401 (conc. opn., J. O'Connor) ("The nature of the criminal charges that are pending is also important, for the greater the charge, the greater the coercive effect."); cf. *United States v. Threw,* 861 F.2d 1046, 1050 (7th Cir. 1988) ("Hobson's choice"); Appendix 9a ("the government should not be given the ability to extract a waiver of these rules from a defendant who is in a weak bargaining position").

With the Sentencing Guidelines (which removes much of the sentencing discretion from the trial judge),[20] the prosecutor has more leverage over the defendant than ever. Under § 5k1.1, for instance, the government has virtually unreviewable discretion to reward defendants for their substantial assistance.[21] See, *Wade v. United States,* —— U.S. ——; 112 S.Ct. 1840 (1992). As Professor Hughes explains, "The lack of measurable standards for fulfillment of the promise confers on the government a tyrannical power to profess a continuing lack of satisfaction so that the cooperator feels goaded to ever greater efforts to please." See, 45 Vanderbilt Law Review, *supra,* at 37. This fact played against the enormous exposure defendants face under the current sentencing laws makes for a gross disparity in the relative bargaining position of the prosecutor and defendant. Given this uneven playing field, conditioning the mere opportunity to engage in plea-negotiations on a waiver of The Rules creates an "incredible dilemma," a dilemma which was unacceptable to Congress and one that should be found intolerable by this Court. Cf. *Green v. United States,* 355 U.S. 184, 193-194 (1957) (invalid waiver theory of double jeopardy protection).

[20] See, *Mistretta v. United States,* 488 U.S. 361, 363-367 (1988).

[21] Only after the defendant enters into a written cooperation-agreement does he have a potential claim of entitlement to a departure from the Guidelines under 5K1.1. See, *infra,* at 32, n.29.

Taking a different tack, the government attempts to sell its "limited" waiver agreement on the promise that it will discourage lying. See, Petition for Rehearing and Suggestion for Rehearing en Banc, at 2, 4. But, in fact, these proffer agreements have a much broader sweep.[22] Requiring waivers of the impeachment protection of The Rules would be harmful to some defendants who "may give inaccurate [plea-statements] due to confusion, mistake or faulty memory." See, *United States v. Dunnigan,* —— U.S. ——; 113 S.Ct. 1111, 1117 (1993); *James v. Illinois,* 493 U.S. 307, 314, n.4 (1989); *id.* at 320-322 (conc. opn., J. Stevens); 45 Vanderbilt Law Review, *supra* at 44, n.157 ("Obviously counsel should not advise the witness to lie in order to preserve conformity, but interviews may be extensive and the witness, through faulty memory or confusion, might create discrepancies. Counsel can make notes during interviews and go over them with the witness prior to his testimony.").[23] As to these defendants, the chill of the waiver requirement exacts a high price on the plea-bargain process.

For this reason, the case of *Newton v. Rumery, supra,* 480 U.S. 386 cuts against the government's waiver initiative. In *Rumery,* the Court considered the waivability of a civil suit under § 1983. In deciding against a per se rule of nonwaivability, the Court relied heavily upon

[22] In fact, under some proffer agreements, the government has used the plea-statements to impeach not only the defendant's testimony, but to impeach or rebut his entire defense. See, *United States v. Dortch et al., supra,* 5 F.3d at 1067-1068, n. 9; *Id.* at 1069 ("just as the defendant must choose whether to protect the proffer statements by not taking the stand, the defendant must choose whether to protect the proffer by carefully determining which lines of questioning to pursue with different witnesses"). The breadth of these proffer agreements goes beyond even the holding of *Harris v. New York, supra,* 440 U.S. 222. See, *James v. Illinois,* 493 U.S. 307, 314-315 (1989).

[23] In this case, respondent met with counsel for only five minutes before the proffer meeting. RT 336-337; JA 74.

the policy in favor of settlement. This, in fact, was the pivotal public interest supporting the release-agreement in *Rumery*:

> "The vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by § 1983 suits. No one suggests that all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. Counsel may be retained by the official, as well as the government entity. Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties. . ."

Id. at pp. 395-396.

Thus, what ran in favor of the government in *Rumery* is a serious liability for the Justice Department in this case. Compare, *United States v. Navarro-Botello,* 912 F.2d 318, 321-322 (9th Cir. 1990) (importance of settlement and finality of criminal cases supports waiver of sentencing rights);[24] see, Appendix 8a-9a. The government's proffer agreements undermine this statutory policy, discouraging many defendants from coming to the plea-bargain table—a result the criminal justice system can ill-afford. Plea-bargaining, now more than ever, is an imperative of our criminal justice system. "In 1985, the federal district courts disposed of 47,360 criminal cases. Of these, only 6,053, or about 12.8%, ended in trial. (Citation). As we have recognized, 'if every serious criminal charge were evaluated through a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.'. . ." *Newton v. Rumery, supra,* 480 U.S. at 396, n.6; see generally, T. Dunworth & C. Weisselberg,

[24] Further, 18 U.S.C. § 3742(a) is a discretionary, not a mandatory, statutory procedure: "A defendant *may* file a notice of appeal . . ." (italics added).

66 Southern California Law Review 99, "The Guidelines Experience" (1992). The plea-statement rules are a concentrated expression of this push for settlement of criminal cases. Cf. *Evans v. Jeff D.*, 475 U.S. 717, 733 (1985) ("a rule prohibiting the comprehensive negotiation of all out standing issues in a pending case might preclude settlement of a substantial number of cases"). All told, then, The Rules are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' (Citation)." Cf. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1977).

On a separate, but related, point, the government submits that the waiver rule serves an invaluable administrative function in policing the truthfulness of proffered information. More specifically, the Justice Department claims that "the absence of such a necessary check . . . may increase the number of instances in which the prosecutor unwittingly presents . . . false testimony" and that such unchecked information may lead law enforcement to act on bad information, causing the government to waste time and valuable resources. See, Brief of U.S., at 26-28, 28 n.8.

For one thing, the Justice Department undervalues the existing mechanisms to deter untruthful proffer statements. A prosecutor may advise a defendant that any untruthful statements given will destroy the defendant's chances of receiving consideration for his substantial assistance under U.S.S.G. § 5k1.1. See, 45 Vanderbilt Law Review, *supra,* at 38-39. For another, the prosecution may use untruthful plea-statements to enhance the defendant's sentence for obstruction of justice under U.S.S.G. § 3C1.1.[25] See, *United Sttaes v. Cox,* 985 F.2d 427,

[25] In addition, in all but the most extraordinary cases, a defendant who has been found to have obstructed justice will not be entitled to a two point reduction for acceptance of responsibility. See, U.S.S.G. § 3E1.1, comm. n. 4. Further, the government may argue to the sentencing court that the defendant should receive

431-432 (8th Cir. 1993). In fact, that is exactly what happened in this case. Respondent's sentence was enhanced by two points under the Guidelines (increasing respondent's prison term by approximately thirty-five months), for obseruction of justice.[26] This punitive measure has the advantage of being more tailored to solving the problem than the government's proposed impeachment proposition. After all, the government's objective is to penalize a defendant for knowingly providing false information, not to punish him for any and all discrepancies in his proffer statements. See, RT 367; JA 97 ("only if he lied and he took the stand"); *United States v. Dunnigan, supra*, 113 S.Ct. at 1117.[27]

B. The Government's Reliance Upon *Newton v. Rumery* is Misplaced.

Throughout its discussion, the Justice Department relies heavily upon the case of *Newton v. Rumery, supra,* 480 U.S. 386 to support its waiver theory. Brief for U.S. at 7, 22, 26 n.7, 32. Respondent believes that *Rumery*

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the high end of the guideline range for his untruthful proffer statements. See, U.S.S.G. § 1B1.4.

[26] The District Court made alternate findings of obstruction of justice: one for respondent's untruthful proffer statements, and the other for his untruthful trial testimony. RT1 26-27. The two point enhancement increased respondent's guideline status from 32 to 34 points. The differential between the midrange of both is approximately thirty-five months. *Id.* at 27.

[27] Finally, the Justice Department's claim that false information may lead prosecutors to unknowingly present false testimony is overstated. For example, in this case, early on in the plea-discussion, the prosecutor and agents knew that respondent's statements were untrue. RT 344-345, 349-351, 367-369; J.A. 80-81, 84-85, 97-99. And, as a precautionary measure, the government could request a defendant to submit to a polygraph examination while giving his proffer. See e.g., *United States v. Crisp*, 817 F.2d 256, 258 (4th Cir. 1987) (plea and cooperation agreement: "Your client further agrees to submit to a polygraph examination at the request of the United States Attorney.").

is both factually and conceptually distinguishable from the present case.

In *Newton v. Rumery, supra,* 480 U.S. 386, the Town of Newton charged Rumery with certain criminal offenses. After retaining an attorney, Rumery, pursuant to negotiations with the County Attorney, entered into a dismissal-release agreement. By the release, Rumery agreed to waive any claims he might have against the town under 42 U.S.C. § 1983 in exchange for the dismissal of the criminal charges against him. Later, Rumery filed a § 1983 action against the town, claiming the release-dismissal agreement was unenforceable. The Court held that such agreements were not per se invalid, reasoning that "[t]he benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in *consideration* of abandoning a civil suit that he may well have lost." *Id.* at 394, italics added. Thus, whereas Rumery gained a tangible benefit from his agreement, the same cannot be said of respondent under the present proffer agreement.[28]

Typical of its proffer agreements, the government's agreement here did not obligate the government to perform on any promise, nor did it impose any duty upon the government. Speaking for the lower court, Judge Sneed explained: "It should be noted that the government extracted the attempted waiver from Mezzanatto, not as part of a plea bargain, but simply as the price for the opportunity to enter into discussions that *could have,* but did not, lead to a plea bargain . . . ." Appendix 9a, italics added. Indeed, in the great majority of cases, the government enjoys unbridled discretion under the terms of its proffer agreement. *Wade v. United States,* —— U.S. ——; 112 S.Ct. 1840, 1844 (1992) ("It follows

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[28] Here, the government pushes the *Rumery* analysis one step further by conditioning a plea-negotiation, not the plea-bargain agreement itself, upon a waiver of The Rules' impeachment protections.

that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing. Nor would additional generalized allegations of an improper motive.").[29]

What respondent gained from his waiver agreement, (assuming that he had the authority to waive The Rules at all), was only an opportunity to enter into a plea-discussion—hardly consideration for a binding contract. Yet, the Justice Department now believes that it has a "right" to enforce its contract, a right, which it in fact, never possessed. Compare, Appendix, 15a.

C. Potential and Actual Abuses of the Proffer Agreement.

Respondent first argued to this Court that the government's waiver scheme invites prosecutorial abuse. Brief in Opposition, at 15-16. The Justice Department contends, however, that the "assumption that prosecutors will engage in abusive practices is contrary to this Court's teaching that 'tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty.' *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987)." Brief for U.S., at 32. Yet, at least with respect to proffer agreements, experience shows that prosecutors do in fact exploit their superior bargaining position. This case, the one the government chose for this

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[29] In *Wade v. United States, supra*, 112 S.Ct. at 1843, this Court explained that the government has "a power, not a duty" to file a motion for a downward departure under § 5k1.1. Since *Wade*, circuit courts have held that the government may bargain away its discretionary power under § 5k1.1 by entering into a written agreement obligating the government to make a substantial assistance motion if the defendant complies with the terms of the cooperation agreement. See, *United States v. Watson*, 988 F.2d 544, 552-553 (5th Cir. 1993); *United States v. Hernandez*, 996 F.2d 62, 65 (5th Cir. 1993); *United States v. Burcell*, 963 F.2d 976, 985 (7th Cir. 1992) (pre-*Wade*).

Court's review, is certainly representative. See, *Newton v. Rumery, supra*, 480 U.S. at 397 (1986) (facts of the particular case on review are illustrative of the broader practice).

With the government's understanding, respondent came to the plea-discussion meeting with the hope of receiving a reduced sentence in exchange for providing the government with helpful information *about other people involved in drug trafficking*. RT 319, 340, 365; JA 61, 77, 96. After respondent had answered the first few questions, (curiously none of the questions related to other suspects or potential defendants), the government determined that respondent was lying. RT 343-344, 368; JA 80, 98.

Rather than terminate the meeting at that point, however, the prosecutor and the two agents repeatedly confronted respondent with his untruthful statements to gather information against him. RT 344-345, 350, 368-369; JA 80-81, 85, 98-99. With each response, the government gained new incriminating information. In sum, the government created and exploited respondent's predicament. Having successfully caught respondent in an inconsistency, the government began using standard interrogation practices to build its case against him. Cf. *Miranda v. Arizona*, 384 U.S. 436, 455 (1965) ("This aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe.").

For example, at the meeting, the federal agents represented to respondent that " 'We have information, maybe, that you had handled some of the glassware.' " RT 373; JA 102. That was a lie. In fact, the agents had no information whatsoever that respondent touched the glassware. RT 373-374; JA 102; See, *Miranda, supra*, 384 U.S. at 450 ("These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty."). Further, during the plea-discussion,

the government repeatedly characterized respondent's statements as admissions. RT 292-295; JA 41-43.[30] Only when the government was through with respondent, when it had enough information to gut his entire defense, did the government terminate the "plea-discussion."[31]

And, since the government never questioned respondent about his knowledge of others involved in the conspiracy, presumably the government never intended to treat the meeting as a true "plea-discussion." In a word, respondent was "set-up." This exploitation subverts the basic purpose of The Rules: "Rule 11(e)(6) recognizes the existence and practice of plea bargaining and is a rule of encouragement. It should not be construed as a tempting rule with built-in deception. It should not be used to seduce confession or admission." See, *United States v. Herman,* 544 F.2d 791, 798 (5th Cir. 1977). By the government's own admission, the impeachment agreement is one of the "weapon[s] in the prosecutor's arsenal." Pet. Cert. at 13. But, as explained by the Fifth Circuit, "[I]t is inherently unfair for the government to engage in [plea-negotiation], only to use it as a *weapon* against the defendant when the negotiations fail." *United States v. Ross,* 493 F.2d 771, 775 (5th Cir. 1974) (italics added). Under the Justice Department's current waiver regime, plea-negotiation—an engagement meant for open and free exchange—has now become an abusive interrogation practice.

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[30] This was a point not lost on the trial court: "You are saying 'admitted' again." RT 295; JA 43.

[31] As a consequence of the proffer agreement, the government was able to successfully strip respondent of any potential entrapment defense. See, RT 384-387. And ultimately, the Justice Department's waiver agreement here sowed the seeds of prosecutorial vouching. See, Respondent's Brief in Opposition at 25-29. The overall effect of the proffer agreement was so powerful that it caused, in the words of the trial judge, "one of the quickest jurys (sic) I have ever had, and I have been at this for 28 years, since 1957." RT 472.

Ironically, while the government now grandstands respondent's untruthful statements, the truth is, both the government and respondent were playing " 'Liar's Poker.' " RT 375; JA 103. This very "cat-and-mouse" game, apparent here and certainly present in many proffer discussions, goes against everything Congress tried to accomplish. On this score, the words of the Eighth Circuit Court of Appeals could not be more apt, "Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk, that plea offers would be admissible evidence." *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976).

D. Governmental Overreaching.

The government argues that its waiver rule is "limited" and tailored to an important law enforcement objective. Petition for Rehearing, at 10-13. But this claim can hardly justify what is an otherwise unlawful practice. Ultimately, we have no real assurance that this "limited" waiver will remain just that. Long ago, this Court declared that unlawful encroachments come first in subtle forms, but their innocent appearance makes them no less dangerous: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635 (1885). A "limited" waiver today may, over time, grow into an oppressive prosecutorial apparatus.

In the end, the Justice Department simply leaves too many questions unanswered. If the government enjoys a free hand in obtaining waivers of this, and by necessary implication, of other mandatory rules, then is there no limit to waivers in general? If the plea-statement rules are waivable, what then is to prevent the government from freely moving its waiver scheme throughout the en-

tire Rule 11 structure?[32] *Brooklyn Bank et al. v. O'Neil, supra*, 324 U.S. at 710 (cannot selectively waive provisions of a uniform Act).[33] May the government use the proffer agreement as a means for extracting waivers of the defendants' many statutory and constitutional protections? Other than the mandatory words of its rules, Congress possesses no other vehicle to ensure the fair administration of criminal justice.

IV. THE GOVERNMENT'S PROFFER AGREEMENTS ARE IMPERMISSIBLE EXTRA-JUDICIAL AGREEMENTS TO WAIVE THE MANDATORY TERMS OF THE RULES.

The government argues that the lower court's waiver analysis creates a false and unworkable distinction. Under the present holding, the Justice Department maintains, a defendant may not affirmatively or expressly waive the plea-statement rules, yet he may forfeit them by not raising a timely trial objection. Brief for U.S., at 15-16. On this score, the Justice Department concludes, "No precedent of this Court supports such an anomalous doctrine." *Id.* at 16.

The government is simply wrong. Whether an express waiver of The Rules is itself valid goes to the threshold question of error in the first instance. If a defendant

[32] Indeed, permitting waivers of Rule 11(e)(6) necessarily implicates waivers of all Rule 11 provisions, as Rule 11 is a unitary and integrated Act. Cf., *Board of Education, New York City v. Harris*, 444 U.S. 130, 141-142 (1979); *Massachusetts Trustee v. United States*, 377 U.S. 235, 245 (1963) ("Viewing the 1946 Act as an integrated whole").

[33] See, Notes of Conference Committee, (1983 Amendment), reprinted in 18 U.S.C. Rule 11, at 363 ("it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this 'results in the creation of an atmosphere of *subtle coercion* that clearly contravenes the policy behind Rule 11' (Citation.)", (italics added).)

lawfully waives a right or rule, there is no error to begin with, and the forfeiture rule is not even implicated. See, *United States v. Olano, supra*, 113 S.Ct. at 1777 ("Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error.' "). The forfeiture analysis, on the other hand, assumes that an error has been committed, and the only remaining question is whether it rises to the level of a "plain error." This Court recently explained this distinction:

> "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rules 52(b) [of the Rules of Criminal Procedure]. Although in theory it could be argued that '[i]f the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review,' (Citation), this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the District Court proceedings, and if the defendant did not [validly] waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection."

Ibid.

Here, the government does not contend that respondent failed to raise a timely trial objection, nor does the government challenge the lower court's finding that the error was not harmless under Rule 52(a) of the Rules of Criminal Procedure. Appendix, 10a. Thus, under *Olano*, the only outstanding question is whether the government's waiver scheme is valid.

The government next argues that stipulations and other evidentiary agreements are qualitatively different from the general run of forfeitures. Brief for U.S. at 19-20. The government continues that, since parties customarily employ the "doctrine of stipulations" to alter the rules of evidence, the plea-statement rules should likewise be alterable by agreement. Brief for U.S. at 17-19. Here again,

the Justice Department misunderstands the principles of the waiver doctrine. To begin with, trial stipulations are, in fact, a species of "forfeitures." See. *United States v. Olano, supra,* 113 S.Ct. at 1771 (stipulated waiver of Rule 24(c) treated as forfeiture). Stipulations, invited errors, untimely objections and the like belong to this same class of trial waivers or "forfeitures." See, e.g., *All American Life and Casualty v. Oceanic Trade Alliance Council Intern'l,* 756 F.2d 474, 479-480 (6th Cir. 1985); *McMahon v. Eli Lilly and Co.,* 774 F.2d 830, 833, n.2 (7th Cir. 1985); *United States v. Williams,* 939 F.2d 721, 723 (9th Cir. 1991). The common thread running through all of them is that they fail to bring to the trial court's attention the potential error of the challenged procedure on review. See, Fed.R.Crim.P. 52(b) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the *attention of the court.*", italics added); see also, Fed.R.Evid. 103(d). Rules 51 and 52 of the Rules of Criminal Procedure set forth an important procedural scheme to ensure that a trial court has an opportunity to consider the claimed error of a particular procedure and to correct it, if necessary, to avoid errors on appeal. See. *United States v. Astling,* 733 F.2d 1446, 1459-1460 (11th Cir. 1984); *United States v. Fix,* 429 F.2d 619, 620 (9th Cir. 1970).

Thus, in a forfeiture context, a party, by her action or inaction during the litigation, is effectively precluded from raising on appellate review any potential error committed below. But this Court has never held that these forfeited errors are themselves proper; indeed, "[m]ere forfeiture, as opposed to waiver, does not extinguish any 'error' under Rule 52(b)." *United States v. Olano, supra,* 113 S.Ct. at 1777. Explained differently, the forfeiture rule limits, or may altogether defeat, a party's ability to seek a remedy for the error, but it does not negate the error itself.

That is why "extra-judicial" waivers, such as proffer agreements, are treated differently than trial waivers:

> "A contract to alter the rules of evidence could properly be considered a waiver. The Rules are silent on this question. Any consideration of the issue should distinguish between a contract made prior to litigation and stipulations entered into by parties while the case is in progress. The stipulation is clearly a procedural device under the control of the trial judge. It is made by parties represented by counsel when its consequences are clear, and in any event, the court has the power to relieve a party of the burden of the stipulation in appropriate cases. . . . [¶] An extra-judicial contract to alter the rules of evidence presents greater problems. . . ."

21 Wright, Fed. Prac. & Proc., *supra,* § 5039, at 206. Trial stipulations are less problematic because they involve a conscious strategic choice made by both parties covering issues arising immediately at trial. They also do not apprise the trial court of the potential error of the stipulated procedure. Thus, there is a vast difference between a stipulation employed as a trial expedient and the Justice Department's extra-judicial proffer agreement. A defendant enters into a proffer agreement not out of choice, but out of necessity. Pressured by his dire predicament, the defendant agrees well in advance of the trial to compromise the protections of the plea-statement rules. He does so not for any strategic reasons, i.e., not for his benefit or convenience during litigation. Rather, he bargains away the protection of The Rules in the uncertain hope that the government *may* give him consideration for his information.

Beyond this, the government's theory of stipulations implicates even larger doctrinal problems. This Court, for instance, may ask whether two or more parties can, for the moment or forever, agree to terms different from those set forth in a mandatory rule of evidence and procedure—to effectively supplant procedural and eviden-

tiary law with private agreements? May parties independently draft rules of evidence and procedure for themselves, even though Congress has already "occupied the field" with its own?

In passing, one commentator noted the broad implications of allowing parties to fashion their own rules: "Wigmore, however, seems to have overlooked the possibility that a legislature, when enacting a particular rule of evidence, aimed precisely to eliminate the authority of the parties to vary the rule established by the statute." See, 1 John Henry Wigmore, "Evidence In Trials at Common Law," (1983 rev. ed. Tillers), § 7a at 589; E. Cleary, 57 Nebraska Law Review 908, 910 (1978) (Congressional Supremacy in ruling-making). The short answer is that parties may never circumvent a legislative mandate by agreement or otherwise. To permit parties to do so undermines the time-honored "rule of law," see, *Marbury v. Madison*, 5 U.S. 137, 163 (1803); indeed, it breaks from the theory of the social compact. See, J. Locke, *The Second Treatise on Government*, Chap. VII, §89, (Cambridge Press 1967).

CONCLUSION

Respondent closes his argument as it began, with one basic principle. Congress makes the laws, and this must remain so despite the perceived needs of the Justice Department. The Justice Department maintains that theirs is a better approach, an approach repeatedly rejected by Congress, but one that has nevertheless continued in the guise of "proffer agreements." Here and elsewhere, the proffer agreement has been effectively used as a device to better manage the government's investigations and to further its prosecutorial goals. But, viewed on a broader scale, this "widespread practice" offends principles fundamental to the rule-making authority of Congress, fundamental to the fair administration of criminal justice.

On a more specific level, the government unduly inflates its claim that the decision below is both unfair and

unworkable. Specifically, the Justice Department maintains that the present holding gives defendants a "license to commit perjury." But this defendant (and presumably many others) paid dearly for his misstatements. Approximately thirty-five months were added to his sentence for obstruction of justice, hardly lying with impunity. This, and the other "weapons in the government's arsenal" are sufficient checks to deter untruthful proffer information. See, U.S.S.G. §§ 1B1.4, 3E1.1, comm. n.4; Pet. Cert. at 13.

Thus, for the aforementioned reasons, the Circuit Court's decision should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent argues at length (Br. 5-20) that the text and legislative history of Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence make clear that those rules give the defendant a right not to be impeached with statements he made during plea discussions. We conceded as much in our opening brief (U.S. Br. 11-12), and therefore respondent's textual and legislative history arguments are largely directed at establishing a proposition that is not at issue in this case. What *is* at issue is whether a defendant's agreement to give up his right under the rules is enforceable by the government. Respondent's analysis of the text and history of the rules does not establish that Congress intended to make such agreements unenforceable.

1. Respondent's first textual argument (Br. 5-6, 9-10, 16) is that Rules 11(e)(6) and 410 state that plea statements are inadmissible "[e]xcept as otherwise provided" in those rules, and that under *Crosby* v. *United States*, 113 S. Ct. 748 (1993), a court may not make a defendant's waiver of his rights an additional exception to those rules.

a. *Crosby* involved Fed. R. Crim. P. 43, which requires the defendant to be present at every stage of his trial "except as otherwise provided" by that rule. One of the "except[ions] * * * provided" by Rule 43 is that a defendant's presence is not required when he is "voluntarily absent after the trial has commenced." See Fed. R. Crim. P. 43(b)(1). A defendant's voluntary absence after the trial begins "operates as a waiver of his right to be present." *Crosby* v. *United States*, 113 S. Ct. at 751-752. The defendant in *Crosby* was tried and convicted in absentia after he failed to appear for the beginning of his trial. This Court reversed, rejecting the government's argument that the defendant's failure to appear for any part of the trial was a knowing waiver of his rights under Rule 43. *Crosby*, however, does not help respondent for two reasons.

First, Rule 43 itself describes the circumstances under which a defendant's failure to appear can be treated as a waiver of his right to be present. We argued in *Crosby* that a failure to appear also could be a waiver in other circumstances. The Court held, however, that the reference in Rule 43 to a single method of waiver, combined with the language "except as otherwise provided," indicated that no other type of waiver was contemplated. *Crosby*, 113 S. Ct. at 751.

There is no basis for a similar conclusion in this case. The Court rejected the government's waiver argument in *Crosby* only because one of the exceptions to Rule 43

is a form of waiver based on the same conduct—absence from trial—on which the government relied to argue for a broader waiver. Rules 11(e)(6) and 410, by contrast, do not provide that their impeachment protection may be waived only upon certain conditions; indeed, the rules do not speak at all to waiver. Thus, unlike Rule 43, the text of the rules at issue in this case gives no reason to conclude that the drafters considered and intended to displace, in whole or in part, the background principle that "[a] party may waive any provision * * * of a statute[] intended for his benefit." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873).[1]

Second, the Court emphasized in *Crosby* that it would be difficult to infer a knowing waiver from the defendant's complete failure to appear at trial. When the defendant is present at the outset of the trial, the Court noted, his "initial presence serves to assure that any waiver is indeed knowing," *Crosby*, 113 S. Ct. at 752, because a defendant who flees in the middle of the trial is bound to know that the trial will continue in his absence. *Ibid.*, citing *Taylor* v. *United States*, 414 U.S. 17, 20 (1973). On the other hand, "[s]ince the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients." *Crosby*, 113 S. Ct. at 752 (internal quotation marks omitted); see

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[1] See also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver * * *, that intention will be deducible from text or legislative history."); *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 362 n.14 (1963) (background principles of law, such as waiver, estoppel, or laches, ordinarily are "presum[ed] applicab[le]").

also *United States* v. *Deeb*, 13 F.3d 1532, 1535 (11th Cir. 1994).

Those considerations have no application here. Respondent did far more than engage in conduct that could, but need not, be interpreted as a waiver. Upon the advice of competent counsel, he entered into an agreement with the government that specifically permitted the government to use his statements to impeach any inconsistent version of events to which he might testify at a later trial. In light of his agreement, respondent has never claimed that his waiver was unknowing; his sole claim is that the right that he agreed to give up is inalienable, and that therefore the government is not entitled to the benefit of its bargain.[2] Nothing in *Crosby* supports that proposition.

b. Respondent's interpretation of the phrase "except as otherwise provided" cannot be reconciled with the accepted practice under other rules of evidence that contain similar or identical language. As we have noted (Br. 17-19), the Rules of Evidence also provide that "[h]earsay is not admissible except as provided" by rule. Fed. R. Evid. 802. If respondent's interpretations were correct, parties to litigation could not dispense with the

[2] Amici National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice (NACDL) challenge the adequacy of the record on the issue whether respondent's waiver was knowingly and intelligently made. NACDL Br. 27-30. That issue, however, was not the basis for the court of appeals' ruling. Moreover, that argument was not raised in the petition or the brief in opposition, and respondent expressly disclaims reliance on it. That issue is therefore not properly before the Court. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (noting that the Court does not decide issues raised by amici that were not decided by the court of appeals or argued by the parties); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (same).

personal appearance of a witness by agreeing to what the witness would say if he were called to testify. Under respondent's theory, that would be an impermissible agreement to introduce the affidavit of the witness, which is inadmissible hearsay. Yet agreements of that type are common practice in federal courts, where parties ordinarily are "give[n] * * * great freedom to waive rules or even to construct new procedures under the doctrine of stipulations." 21 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5039, at 207 (1977).

Respondent contends (Br. 37-38) that stipulations should be distinguished from his agreement, because stipulations are usually entered into or ratified at trial, so that they are properly characterized as a species of forfeiture. Thus, respondent contends, stipulation practice sheds no light on whether rights provided by the Rules of Evidence are waivable. Stipulations, however, are frequently negotiated and signed before trial. Indeed, it would be poor trial strategy for any attorney who bears the burden of proof on an issue to wait until the trial to ascertain whether his opponent will agree to stipulate to the matter.[3] In any event, the fact that the

[3] There is no merit to respondent's argument (Br. 39-40) that, if his agreement is analogous to a stipulation, it is the type of "extra-judicial" stipulation that has been disfavored by commentators. Respondent's argument confuses stipulations reached outside of a *courtroom* with agreements made outside the context of a particular *case*. The latter are primarily agreements in which a party waives his rights in the same contract that creates a commercial relationship with another, before any litigation ensues and before the party who waives his rights can know of the specific litigation context in which his waiver will be invoked. As we explained in our opening brief (at 17 n.4), it is only the latter type of stipulations that are "extra-judicial" in the relevant sense.

Rules of Evidence and the Criminal Rules permit forfeiture of a defendant's claim that his plea statements are inadmissible is compelling evidence that that type of evidence is not invested with any special protection against a knowing and intelligent waiver. Whether a particular protection may be forfeited is a *harder* policy question for an evidentiary system than whether the same protection may be waived, because forfeiture operates even when the defendant and his counsel were not aware that there were legal grounds for excluding the evidence.[4]

Respondent errs in suggesting (Br. 11 n.9, 36-37) that an attorney who signs a stipulation proffered by his opponent before trial can nonetheless demand strict compliance with the rules (and preserve "error" for appellate review) simply by objecting at trial, and thereby require his opponent to produce the witness whose presence he had already agreed to excuse. No district court would countenance that tactic, and with good reason. Nothing in the Rules of Evidence in general, or in Rules 11(e)(6) and 410 in particular, can fairly be read to require that a district court permit a party to ambush his opponent by reneging on his pretrial

[4] Respondent notes that Section 1B1.8 of the Sentencing Guidelines provides that parties may agree to the admissibility of self-incriminating information provided pursuant to a cooperation agreement. The inclusion of a specific reference to the possibility of agreement, respondent argues, indicates that Rules 11(e)(6) and 410 must not be meant to permit such an agreement. The Rules and the Guidelines, however, are different bodies of law that were promulgated by different entities; the fact that the Sentencing Commission chose to refer specifically to the effect of agreement says little or nothing about what consequence should attach to the absence of specific reference to agreement in the Rules promulgated by Congress and this Court.

agreement in that fashion, or to obtain a benefit from his opponent by agreeing to waive the application of a rule, as respondent did, only to invoke the rule at trial when he thinks better of the bargain. As this Court noted in *Shutte* v. *Thompson*, *supra*, if a party induces his opponent to act in a certain way by appearing to waive his rights under a rule of evidence before trial, "he ought not to be permitted to raise the objections at all [at trial]. If he may, he is allowed to avail himself of what is substantially a fraud * * * and a court whose province it is to administer justice, will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." 82 U.S. (15 Wall.) at 159.[5]

2. Respondent next contends (Br. 6-16) that Rules 11(e)(6) and 410 "were written in absolute, mandatory terms," and that a mandatory rule "must be followed," notwithstanding the wishes of the parties, unless the rule itself expressly authorizes waiver. This Court, however, has never held that statutory rights phrased in

[5] Respondent asserts that the government's agreement to devote the resources necessary to meeting with him and to explore his purported desire to cooperate with the government was "hardly consideration for a binding contract." Br. 32. As we have previously explained (U.S. Br. 26-27), that is not correct. Moreover, it was respondent who asked to meet with the prosecutor. He agreed to waive some of his rights under Rules 11(e)(6) and 410 because he thought the opportunity to persuade the prosecutor to use him against others was valuable. What is more, as Chief Judge Wallace observed, it was respondent who gave up little in the bargain. "By forfeiting his ability to provide inconsistent testimony at trial, the defendant has forsaken—or at least diminished—his 'right' to lie at some stage of the prosecution. The defendant who forsakes this 'right,' of course, has sacrificed nothing, as no defendant has the 'right' to provide false testimony." Pet. App. 14a (Wallace, J., dissenting), citing *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986).

"mandatory" terms are unwaivable unless Congress expressly states that their waiver is permitted. To the contrary, the default rule provides that a party may waive any constitutional or statutory provision intended for his benefit, see *Shutte* v. *Thompson*, *supra*; *Insurance Corp. of Ireland, Ltd.* v. *Compangnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Accordingly, even "[t]he most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991). That a rule is framed in "mandatory" terms does not change that background principle. The Constitution uses mandatory and unqualified language to confer numerous rights that this Court has found subject to the general principle of waiver. Respondent contends that constitutional rights stand on a different footing, and echoes the reasoning of the court of appeals in urging (Br. 13-16) that this Court should make it more difficult for a defendant to waive rights conferred by statute than those conferred by the Constitution, because it is easier to change or repeal a statute than to amend the Constitution.

It would be anomalous to hold that less exacting standards apply to the waiver of constitutional rights than to the waiver of rights created by statute. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); see also *Peters* v. *Kiff*, 407 U.S. 493, 512 n.* (1972) (Burger, C.J., dissenting). In any event, respondent's contentions miss the point. Waivers of constitutional rights are given effect not because it is difficult to amend the Constitution, but because those rights are intended for "the protection of an accused," and "to deny him * * * the right to dispense with some of these safeguards * * * is to imprison a man in his privileges and call it the Constitution." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 280 (1942). The same is true

of statutory rights, as this Court's decision in *Shutte* v. *Thompson*, *supra*, illustrates. The evidentiary rule at issue there was prescribed by a statute that used mandatory words to prescribe the required oath and other procedures. See Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 88-90. Although those procedures were not observed in the case, this Court nonetheless concluded that "it is obvious that all the provisions made in the statute * * * were introduced for the protection of the party against whom the testimony of the witness is to be used. It is not to be doubted that he may waive them." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) at 159.

Respondent seeks to avoid this analysis by arguing that Rules 11(e)(6) and 410 were not intended for the benefit of criminal defendants, but were designed to prescribe an inflexible process in order to encourage plea negotiations. Br. 12. In respondent's view, the rules "are not so much 'rights' as they are rules to 'guarantee fair procedure.'" *Ibid.*; see also NACDL Br. 22. It is true, of course, that rules of evidence generally reflect societal consensus that certain procedures are fair. That point does not, however, support respondent's claim that the party who would benefit from application of a particular rule may not waive his right to invoke it in a particular case. Respondent's claim is especially implausible with respect to rules, like the plea bargaining rules at issue here, that provide that certain types of evidence are inadmissible against criminal defendants. It has always been understood that such exclusionary rules reflect "the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in judgment); see also *id.* at 522-524 (majority opinion).

3. Respondent derives no greater support from the legislative history of Rules 11(e)(6) and 410. Br. 16-20. Those materials confirm that the rules do not authorize the use of plea statements for impeachment, but they do not speak at all to the propositions that respondent must establish to prevail—*i.e.*, that Congress specifically considered the subject of waiver and that it intended to displace the background rule that permits a party to waive any provision intended for his benefit.

That Rules 11(e)(6) and 410 were intended to promote plea bargaining, as respondent emphasizes, does not establish that intention. Plea bargaining is more likely to occur when the parties themselves are permitted to agree on the terms on which it will proceed. Respondent contends that "common sense, alone, tells us" that waiver "acts as a brake, not as a facilitator, to the plea-bargaining process," because "requiring a defendant to waive the impeachment protection * * * before he even begins discussing the case with the government would make any defendant think twice about engaging in a plea-negotiation." Br. 23 n.17. Respondent, however, was not "required" to do anything. He sought out the prosecutor, and he entered into a voluntary agreement with the government upon the advice of competent counsel. More importantly, there can be no bargain without the concurrence of two parties. The best evidence of what ground rules are likely to promote bargaining is furnished by the rules to which the parties themselves have agreed as conducive to that end. That respondent later found reason to be unhappy with his bargain does not make the bargain one he should not have been permitted to enter. The fact that Congress rejected an impeachment exception to Rules 11(e)(6) and 410 does not establish that Congress intended to forbid waiver of that protection. All that can be inferred from the rejection of

the impeachment exception is that Congress gave the defendant the right to preclude the government from using his statements in that manner. It does not follow that Congress intended that right to be inalienable, much less that Congress expressed that intention in terms sufficiently clear to override the longstanding principle that a party may waive any provision intended for his benefit.

4. Respondent also contends (Br. 20-36) that his agreement violates the public policy in favor of plea bargaining. We acknowledged in our opening brief that the fact that a right is personal and may be waived does not mean that a court must accept a waiver of that right if to do so would offend public policy. See *Wheat* v. *United States*, 486 U.S. 153, 160-162 (1988). We also acknowledged that a defendant's agreement waiving his rights is subject to avoidance if a defendant can establish any recognized defense to the enforcement of contractual obligations, including the defense that the agreement violates public policy derived from "laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany* v. *United States*, 324 U.S. 49, 66 (1945)). Respondent's public policy contentions, however, largely consist of repeating his unsupported claim that Rules 11(e)(6) and 410 forbid any waiver of the rights they confer. Respondent also argues that it would be inequitable to enforce his agreement because the government's superior bargaining power might be abused. Those contentions fall far short of establishing that respondent's voluntary agreement is unenforceable.

a. As we noted in our opening brief (at 24-25), discussions about cooperation may or may not develop

into negotiations about a plea bargain. For that reason, meetings such as respondent had with the prosecutor in this case are not always "plea discussions with an attorney for the prosecuting authority." Fed. R. Evid. 410(4). Agreements outlining the consequences for admissibility of such proffer sessions therefore foster desirable predictability for both parties and serve to avoid wasteful collateral litigation about whether the meeting, as it actually developed, was in fact a "plea bargaining" session. Respondent does not address our argument, but simply argues his position as if a proffer of cooperation were at the very core of the type of "plea bargaining" that Congress intended to address when it enacted Rules 11(e)(6) and 410. Nor does respondent persuasively address our submission (U.S. Br. 27-28) that the cooperation context, and the uses to which the government puts the information it obtains through cooperation, give the government a compelling interest in the truthfulness of a defendant's proffer that goes well beyond the government's interest in not being lied to in an ordinary plea bargain.[6]

Respondent contends instead that it is "inherently unfair and coercive" (Br. 25-26) to hold him to his agreement, because defendants who face the punishments prescribed by the Sentencing Guidelines can obtain leniency only by cooperating with the government, and therefore "the current sentencing laws make[] for a gross disparity in the relative bargaining position[s] of the prosecutor and defendant." Br. 26; see

[6] The cooperation context alone accounts for the prosecutor's need to meet with the defendant to assess his credibility and the value of his information. A prosecutor who wishes only to engage in plea bargaining can work out a deal with the defendant's counsel without hearing from the defendant at all.

also NACDL Br. 13-16. That type of disparity in bargaining power, however, does not make respondent's agreement unfair in a sense relevant to any recognized defense to contractual liability.[7] Indeed, a parallel argument could be made with respect to traditional forms of plea bargaining, since a defendant whose guilt makes conviction highly likely may view himself as "coerced" in the sense of having few and unpalatable choices at the bargaining table. See Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1919-1921 (1992). Nonetheless, the law "has resolutely rejected" that argument, *id.* at 1920, and this Court has always proceeded on the assumption that the strength of the government's case is no basis for finding an improper disparity in bargaining power between the government and the defendant. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978). See also *Alabama* v. *Smith*, 490 U.S. 794, 802-803 (1989); *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-221 (1978); *Brady* v. *United States*, 397 U.S. 742, 750, 756-757 (1970).

[7] Respondent's argument sounds some of the themes raised by the contractual defenses of duress and unconscionability. Like other recognized defenses, duress and unconscionability would of course be available to challenge the validity of any specific agreement in which a defendant has waived his rights, where the defendant is able to make the demanding showing on which the law of contracts conditions their applicability. See generally ALI, Restatement (Second) of Contracts §§ 174-177 (1981) (duress); *id.* § 208 (unconscionability); *Hume* v. *United States*, 132 U.S. 406 (1889). Respondent never claimed below, however, that the circumstances of his case called for application of those defenses to contractual liability, or that he could meet the elements of either of them. His claim has been, and remains, that the nature of the right he gave up by itself requires invalidation of similar agreements in all circumstances.

The coercion argument is no more persuasive in the cooperation context than with respect to traditional forms of plea bargaining. Congress and the Sentencing Commission gave prosecutors nearly unreviewable discretion to reward a defendant's cooperation, see *Wade* v. *United States*, 112 S. Ct. 1840 (1992), because prosecutors are best situated to judge what information is valuable in the investigation or prosecution of others. A defendant has no "right" to a substantial assistance motion.[8] When the prosecutor withholds a substantial assistance motion, the consequence is that the defendant receives the sentence that Congress and the Sentencing Commission determined to be appropriate for his offense and criminal history. Cf. *Singer* v. *United States*, 380 U.S. 24, 36 (1965). Whatever "coercive" effect that sentence exerts, it is the result of the defendant's own criminality, not the product of any improper conduct on the part of the prosecutor.

b. Respondent also contends that proffer agreements can be abused by prosecutors who will agree to hear a proffer from the defendant solely in order better to prepare their cases with no true intent to explore the defendant's potential as a cooperating witness. For several reasons, that claim cannot support the broad *per se* prohibition sought by respondent.

---

[8] For that reason, respondent is wrong to argue that defendants who agree to cooperate with the government in order to obtain a substantial assistance motion should not "be required to jeopardize their defense." Br. 25. The government may fairly ask for the strongest available assurances that the testimony on which a putative witness would send others to jail is not a tailored version of the events. Nothing in the plea bargaining rules entitles a defendant to cooperate with the government half-way—"to ride with the cops and cheer for the robbers." *Rankin* v. *McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting).

As this Court has repeatedly recognized, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). See also *Town of Newton* v. *Rumery*, 480 U.S. 386, 395-397 (1987); *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943). The present context is particularly unsuited for an exception to that principle. When prosecutors meet with a witness who has proffered his cooperation, the prospective witness is almost invariably represented by counsel (as respondent was) who advises him on the wisdom of the agreement proposed by the government, and who ordinarily is present during the debriefing by the prosecutor (as respondent's counsel was) and can therefore protect the witness against any danger of overreaching.

Moreover, the prosecutor has a strong interest in encouraging the cooperation of defendants and rewarding defendants who provide substantial assistance. The prosecutor's misuse of proffer agreements in the manner posited by respondent, like the prosecutor's failure to make a substantial assistance motion on behalf of those defendants who have provided significant assistance, is likely to impair the effectiveness of the prosecutor's efforts to persuade other defendants to cooperate. Because prosecutors need the testimony and leads provided by cooperating witnesses, no prudent prosecutor can afford to engage in the improper conduct that respondent fears.

To the extent that a prosecutor in a particular case abuses the process by entering into a proffer agreement with no intention of discharging his part of the bargain in good faith, or by misrepresenting his intentions to the defendant and his counsel, contract law provides

adequate remedies without the need for the *per se* rule of invalidity sought by petitioner. As with other areas in which the law assumes that prosecutors will discharge their duties properly, see, *e.g.*, *Wade* v. *United States*, 112 S. Ct. at 1843-1844, a defendant who makes a substantial preliminary showing to the contrary can obtain discovery on his claim and a hearing. If the evidence warrants a finding that the prosecutor procured the defendant's waiver of his impeachment rights by fraud or misrepresentation, the district court may properly relieve the defendant of his obligations under the agreement. See ALI, Restatement (Second) of Contracts §§ 159-173 (1981).

Respondent and his amici suggest that the prosecutor in this case engaged in that type of misconduct, because respondent was asked primarily about his own crime rather than about the activities of others. Br. 32-35; NACDL Br. 24-27. As respondent himself acknowledges, however, "[t]he very best information, information bearing the most indicia of reliability, is based upon a defendant's personal involvement and association with the criminal conduct under investigation. Thus, the most helpful proffer is necessarily that which incriminates or implicates the defendant in the suspected criminal activity." Br. 24. Moreover, because the prosecutor needs to satisfy himself that a prospective witness is being truthful, and that he would hold up well under cross-examination if he were to testify for the government, there is nothing untoward in the prosecutor's use of "interrogation technique[s]" (NACDL Br. 26; Resp. Br. 33) to attempt to shake the witness's story, or to do so with matters (such as information involving the witness's own crime) that the prosecutor can easily verify through other sources. Finally, as respondent's own statement of the case

reflects, the prosecutor's questions did in fact relate to the participation of another person in the crimes under investigation—one "Uncle Bob," who purportedly supplied respondent with the methamphetamine that he delivered to the undercover agent. Br. 2.

c. Respondent does not dispute that the agreement invalidated by the Ninth Circuit advances the compelling interest in the truthfinding function of criminal trials, because it discourages a defendant from "affirmatively resort[ing] to perjurious testimony in reliance on the Government's disability to challenge his credibility." *James* v. *Illinois*, 493 U.S. 307, 312 (1990) (quoting *Walder* v. *United States*, 347 U.S. 62, 65 (1954)). Respondent faults us (Br. 29-30), however, for "undervalu[ing] existing mechanisms" that could adequately serve that interest, such as the prosecutor's right not to seek a sentence reduction for a defendant who lies and the court's ability, in appropriate cases, to enhance the defendant's sentence under the Guidelines provisions for obstruction of justice. See Guidelines § 3C1.1 (Nov. 1993); *United States* v. *Dunnigan*, 113 S. Ct. 1111 (1993).

Respondent's argument is flawed. A defendant who is willing to commit perjury at trial does so in order to avoid *conviction*, and if his perjury is successful no question as to the probable severity of his *sentence* can possibly arise. When the defendant has knowingly agreed to let the government use his proffer for impeachment, and those statements are inconsistent with the defendant's trial testimony, there is no good reason to keep that inconsistency from the jury, for the additional information tends to increase the reliability of the verdict. See *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980). Giving effect to the waiver challenged by respondent therefore is consistent with the fundamental

canon that evidentiary rules should "be construed to secure fairness in administration * * * to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102; see also Fed. R. Crim. P. 2.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

MOTION FILED

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No. 93-1340

In the Supreme Court of the United States
October Term 1993

United States of America, Petitioner

v.

Gary Mezzanatto, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND THE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT BY THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

The National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice request the Court leave to file the amicus brief in support of respondent pursuant to Rule 37.4. The National Association of Criminal Defense Lawyers is a national organization composed of public and private criminal defense lawyers whose work emphasis is in the area of federal criminal defense.

The California Attorneys for Criminal Justice (CACJ) is the second largest criminal defense organization in the country. CACJ is a California non-profit organization with approximately 2,700 dues paying members, primarily criminal defense lawyers, both public and private, who appear regularly in the state and federal courts.

Previously, the amici had garnered permission to file an amicus brief in support of the respondent from both the Solicitor as well as the respondent. (See footnote one to the amicus brief, and the copy of the consent from the Solicitor.) However, just prior to our filing this brief, the respondent informs us that he has withdrawn his previously given consent, thus necessitating this motion for leave to file the brief.

Respondent objects to our including within our brief an important issue we believe inherent in the

question presented by the case, that is, whether the record reflects any "waiver" of rights by the respondent prior to or during the pre-trial settlement discussions. The amici believe that if the Court were to find that such "waivers" are permissible prior to a settlement conference, then no discussion of the question presented could ensue without both analyzing the nature of admonitions and waiver required as well as whether such waiver is supported in this record.

Respondent does not wish this issue presented to the Court, resulting in his withdrawal of consent to file the attached brief on his behalf. We strongly believe the issue we raise concerning respondent's non-waiver of rights supports respondent and in no way detracts from his other arguments.

That this issue must be confronted in any analysis of the question in this case is manifest. Indeed, because this record contains nothing approaching a waiver of rights,[1] the Court may elect to dismiss this case as improvidently granted because the record will not support addressing, except as an advisory opinion, the merits of the question presented. See **Monrosa v. Carbon Black, Inc.,** 359 U.S. 180, 184 (1959).

As we explain in our brief (pp. 27-30), the Government has the burden to show that a waiver of rights was made by respondent prior to the settlement conference and that it was knowing, intelligent and

[1] "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights.'" **Carnley v. Cochran,** 369 U.S. 506, 514 (1962); quoting from **Johnson v. Zerbst,** 304 U.S. 458, 464-465 (1938).

voluntary. **Town of Newton v. Rumery**, 480 U.S. 386, 397-398, 399 (1987). Yet, the trial record shows only that respondent and the one agent to the settlement interview testified concerning this issue. Nothing respondent testified to could in the least support either an understanding of the dangers of making statements, the constitutional rights which were being sacrificed, or any knowing and intelligent waiver of those rights.

The Government agent merely testified that the prosecutor told respondent at the start of the meeting that if respondent took the stand at trial anything that he might say at the meeting could be "brought up in a trial setting." J.A. 97. The agent also testified that respondent was told that if respondent lied, he would be charged with false statements. He was told of some Kastigar matter of which the agent did not recall the details. J.A. 96-97. The agent then moved on to recite what statements respondent made about the drugs charges. J.A. 97.

Nothing in the agents' trial testimony shows that the respondent either received proper warnings, understood those warnings or knowingly waived them. A mere admonishment is not a waiver. J.A. 83.

Because the record shows no proper admonition, or waiver or affirmative agreement to the conditions of the meeting, this Court has no "waiver" issue to assess. Cf., **Boykin v. Alabama,** 395 U.S. 238 (1969) (courts cannot assume from a silent record that a guilty plea had been voluntarily made or that constitutional rights have been freely and intelligently waived).

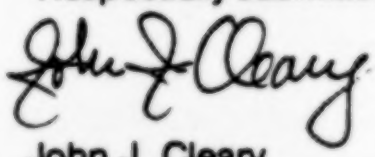
As we note in our brief, the waiver issue in this

context is particularly delicate given the dramatic imbalance of power in the negotiations, the ex parte nature of the discussions, and the unilateral post-conference power of the prosecution to inform the defendant that the Government deems his previously-made statements false with the consequence that the statements given may now be used as evidence against him.

Assuming as a matter of policy this Court permits "waivers" in settlement negotiations, given the noted power imbalance, the ambiguity and the informal (i.e., non-reported) nature of these conferences, any "waiver" must be unequivocally clear and with full disclosure of fact that the defendant may well be incriminating himself without the slightest guarantee that his statements will not be used against him later at a trial.

Unless this brief is filed, an important issue contained within the question presented may go unaddressed by the parties. We ask leave to file the attached brief.

Respectfully submitted,



DATED: July 1, 1994

John J. Cleary
for the amici
Member of Supreme Court Bar

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers is the national organization of public and private criminal defense lawyers with emphasis on federal criminal practice.[2] The California Attorneys for Criminal Justice (CACJ[3]) is the second largest criminal defense organization in the country.

Both organizations are concerned about the forced waiver of the defendant's rights as an incident of plea bargaining in the federal courts. Given the shift of sentencing power to the prosecutor under the Sentencing Guidelines, the amici are concerned about the ability of the Government to extract informal "waivers" of constitutional rights at the outset of a prosecution in settlement negotiations. This situations is so fraught with the potential for abuse, it is why, as a matter of public policy, Congress prohibited the evidentiary use of statements made during settlement discussions.

Today in federal plea bargaining, the Sentencing Reform Act of 1984 and draconian minimum mandatory sentences force the accused federal defendant to con-

[1] Letters of consent to file this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] This 34-year-old District of Columbia non-profit corporation has a membership of 8,000 lawyers and 28,000 affiliate members. It is an affiliate of the American Bar Association.

[3] CACJ is a California non-profit organization with approximately 2,700 dues paying members, primarily criminal defense lawyers, both public and private, who appear regularly in the state and federal courts.

sider and enter into settlement negotiations. This is so even for the innocent. **North Carolina v. Alford**, 400 U.S. 25 (1970). Such "settlement negotiations" currently take place on a non-level playing field, in which the federal prosecutor determines the sentence. Only prosecution-approved "cooperation"[4] will be the basis for the award of a sentence less than statutory minimum mandatories or a basis for a downward departure. The prosecution's conditioning participation in settlement on waiver of basic rights provides neither a voluntary waiver nor free consent.

In this case, the record shows no attempt by the Government to fulfill its burden to show waiver of constitutional or statutory rights by respondent. If the Government is to be deemed able to extract and use at trial evidence garnered in settlement discussions, the waiver of constitutional and statutory rights must be explicit. It does not exist in this case.

Approximately 90 per cent of all federal criminal cases are resolved by pleas of guilty. The settlement process is not one of choice. Because defense counsel must explore the options to litigation, rules established by Congress protect this process from exploitation. In any negotiation, much is unknown, and there may be misunderstandings in need of clarification and re-evaluations based on proffers. To work, the process has to foster an atmosphere of open-ended "give-and-take." The

[4] Even if a defendant provides "substantial assistance" in cooperation against another, the prosecutor need not make the requisite motion (18 U.S.C. 3553(e)) to permit the court to impose a sentence less than the Guidelines or the minimum mandatory. **Wade v. United States**, 112 S.Ct. 1840 (1992).

"negotiation" cannot be converted into a device for an extended interrogation by the prosecution agents in order to obtain information for use at trial. To entice a defendant into settlement discussions which serve as a battleground for an eventual evidentiary ambush at trial, makes the defendant a compelled adverse witness against himself in violation of the Fifth Amendment.

Further, basic due process and equality of negotiation position cannot be waiveable without making the process completely unfair. The Ninth Circuit majority opinion was correct as a matter of law and policy, a policy dictated by Congress in the promulgation of the Rules.[5] Those Rules create a fair balance in the negotiation process and so encourage settlement.

ADDITIONAL CONSTITUTIONAL PROVISIONS:

Fifth Amendment: . . . "nor shall [any person] be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

[5] The two rules, Fed. R. Crim. Proc. 11(e)(6) and Fed. R. Evid. 410, were promulgated by Congress under its constitutional authority to constitute tribunals inferior to this Court (Article I, Section 8, clause 9) and the "necessary and proper" clause. The district court criminal and evidentiary rules announced by this Court are the creatures of Congressional mandate and are subject to the overview and revision of Congress. 28 U.S.C. 2072, 2073. The Congressional primacy to legislate procedure in the district court, which includes settlement proceedings, should not be eroded by an analogy to this Court's primacy in the interpretation of the rights of individuals under the Constitution. E. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 **Neb. L. Rev.** 908, 910 (1978).

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Supplemental Statement of Facts[6]

The attorney who represented respondent at the pre-trial post-indictment interview was not the same attorney who represented him at trial. J.A. 40.

Trial Testimony

At trial the respondent, an unemployed electrician, testified in his own behalf. J.A. 14-38, 14-15. Respondent was hired by Gordon Shuster to do some electrical work and became his on-call handyman. J.A. 19-20. Shuster told respondent he was a shipbuilder and a special agent for the CIA who made plastic explosives.[7]

[6] An amplified statement of the facts setting forth the order of evidence at trial is necessary to demonstrate that the "settlement interview" was not for a resolution of the case or the exploration of the "substantial assistance in the investigation or prosecution of another person," but a planned interrogation that could be successfully exploited at trial pitting the agent's recollection of the events against that of respondent.

[7] The court sustained the prosecution's objection, on relevancy grounds, to the presentation of defense witnesses Bernard and Lorene Cook, who would have testified that Shuster had also told them that he was making explosives on his property. J.A. 86-90, 92-94. The statements were not offered for the truth of the matter, but to corroborate the challenged statement of the respondent that he believed Shuster's operation involved explosives, not drugs.

Respondent testified that on the day of his arrest, 1 August 1991, he had a pager that Shuster had instructed him to buy so he could be contacted for work. J.A. 29. Shuster advised him not to have it registered in his own name because of their connection, and respondent later wrote to the pager company giving them the name of a fictitious purchaser. J.A. 31.

On 1 August 1991, respondent answered a page from Shuster who asked him to bring him a sealed and stapled brown mailer package that Shuster had given respondent the day before. J.A. 29-32. He was reluctant to comply because of a prior commitment, but agreed when Shuster offered him $1,300 for the delivery. J.A. 32-34. Respondent met Shuster, who had been arrested earlier that day, at a restaurant. Shuster was now acting as an informant for the agents. An undercover officer, posing as Shuster's friend, was also there. J.A. 34-35, 36. Shuster asked him if he had the stuff. Respondent said the package was in his car. J.A. 35. Shuster suggested that they check out the stuff. J.A. 36. The officer stated, "Stuff looks real good and clean," apparently to Shuster. J.A. 37. Respondent, referring to a glass pipe in the ashtray, not the package, asked them if they wanted a hit. J.A. 37. Respondent denied the testimony of the agent who previously testified that respondent was trying to get them to test the contents of the package or that he wanted money to get another pound of drugs. J.A. 38.

One third of the cross-examination of the respondent by the prosecutor focused on his interview of respondent in the U. S. Attorney's Office before trial. (Total cross: 36 pages. J.A. 38-73. Cross as to interview: 12 pages. J.A. 39-44, 61-67.) At the outset of cross-examination, the prosecutor inquired about respondent's

meeting with two agents and himself. J.A. 39-40. Respondent stated that at the meeting he knew that Shuster and Uncle Bob were trafficking in methamphetamine and that he picked up the package of methamphetamine on the day of the arrest from Uncle Bob. J.A. 41-42. When asked whether he stated the package contained methamphetamine, he testified he was unaware of it at the time he delivered it. J.A. 42. He denied telling the prosecutor that he dealt in ounce quantities of methamphetamine prior to his arrest, but testified that he had told them that the largest amount he had known to be in transactions were ounces. J.A. 43. During the interview he stated that although he never dealt in methamphetamine, he previously had smoked it. J.A. 44.

Redirect examination of the respondent was devoted almost entirely to the interview with the prosecutor and the agents.[8] J.A. 74-83. During the meeting, one of the agents corrected the respondent's error in thinking he was facing a minimum mandatory five-year sentence. Rather, he told respondent it was a ten-year minimum mandatory, and he offered two years of a reduced sentence for coming in for the debriefing. J.A. 77. Respondent was told by the prosecutor "that the Government was the only person – that could refrain from the

[8] Respondent testified he spent five minutes with his lawyer discussing the purpose of the meeting. J.A. 74. The attorney explained that the meeting's purpose was to reduce his sentence (J.A. 75), and told him that the Guidelines dictated a five-year minimum mandatory sentence. J.A. 76.

sentencing guidelines, the judge had no control over it."[9] J.A. 78-79. The atmosphere of the settlement interview was "intimidating [and] unfriendly." J.A. 79. One agent called him a liar and accused him of lying about picking up the package from Uncle Bob, and respondent admitted that statement was false at the interview. J.A. 80-81. According to respondent, the prosecutor terminated the interview. J.A. 81. Respondent, in his last answer on re-direct, testified that on the day of his arrest he did not know what the package contained.[10] J.A 83.

In rebuttal, the Government called Agent Moreland,

[9] A different district court judge substituted different counsel for the one who attended the interview. One of the reasons for the substitution was counsel's misunderstanding of the minimum mandatory sentence. 22 Oct 91 R.T. 2-3, 6-9. This judge confirmed at a court hearing what the prosecutor told respondent – that only the Government could influence the amount of the sentence: "First of all, the reason you have plea bargaining is because the Government is in a position to manipulate under the Guidelines what the sentence – what the sentence can be. . . . And even then the Government is the only one who can manipulate the 10-year period; the court can't do it under the Guidelines. Only under a 5K1.1 can the Government manipulate the mandatory minimum. That's all there is to it." 22 Oct 91 R.T. 9; J.A. 79.

[10] On recross, the prosecutor asked if respondent was given an opportunity to tell what occurred on 1 August. Respondent testified that he was only permitted to answer questions. J.A. 84. Respondent recalled that the agents accused him of lying, but he did not remember doing so. J.A. 84. Respondent was given an opportunity to speak with his attorney during the meeting. J.A. 86. Respondent denied saying during the interview that he knew Shuster was manufacturing methamphetamine prior to 1 August. J.A. 86.

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who had been present at the interview.[11] J.A. 95-106. The agent testified that respondent and his attorney had requested a meeting and wanted to cooperate with the Government in the hopes of receiving some consideration at sentencing.[12] J.A. 96. The meeting lasted 15, 20 minutes, total. J.A. 96. Respondent was told that he had to provide information, that he had to be truthful, that he could be subject to being charged with false statements, that if he told one thing at one time and something contradictory at a later time, that could be brought up in a trial setting, that if he pleaded guilty, he would receive some consideration for any truthful information, that if any information he supplied could be used at a later date he would be given consideration, and some reference about a Kastigar meeting.[13] J.A. 96-97. According to Agent Moreland, the prosecutor also told the respondent: "that none of the information would be used against him in [the] case in chief, only if he lied and took the stand." J.A. 97.

Respondent denied being apprised of the waiver permitting his statements to be used for impeachment purposes. The agent testified only as to the admonition of the conditions of the interview, but never inquired whether respondent understood those conditions or waived any rights.[14]

Agent Moreland testified that during the interview respondent started by telling him he had only dealt ounce quantities prior to the meeting on 1 August. J.A. 97. He admitted knowing the package contained methamphetamine, but said that this was the first time he ever dealt a pound of methamphetamine. J.A. 98. Respondent stated that he had obtained the pound from Uncle Bob and did not know anything about the manufacturing.

[11] After this witness testified, respondent's attorney asked to call the prosecutor as witness to the interview. The court denied the request because he was the lawyer [for the Government] in the case. J.A. 106. This right of compulsory process of a material witness was violated and is an issue that in the future will have to be resolved. If prosecutors obtain these statements in a settlement negotiation and plan to use them at trial, they would obviously be a material witness subject to call by the defense. If so, then the case must be handed off to another prosecutor to avoid the trial attorney being called as a witness. **United States v. Prantil,** 756 F.2d 759 (9th Cir. 1985).

[12] Section 3553(e) of Title 18 provides: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

Section 5K1.1 of the Sentencing Guidelines provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." See **Wade v. United States**, 112 S.Ct. 1840, 1843 (1992).

[13] The prosecutor had earlier stated to the judge: "And, third, we made it very clear to the attorneys present that we not go through a Kastigar hearing, that we would make derivative use of any evidence he provided us, which essentially was nothing." J.A. 91. The reference appears to be to **Kastigar v. United States**, 406 U.S. 441 (1972), which held that statutory use and derivative use immunity was coextensive with the privilege against self-incrimination. This additional settlement waiver appears to permit the Government to derivatively use evidence obtained in violation of the privilege against self-incrimination.

[14] The facts and analysis of the failure of the waiver are set forth under the last argument heading.

Moreland testified that the agents thought respondent was lying and confronted him. J.A. 98. They asked respondent if his fingerprints were on any of the glassware found at Shuster's property, and he admitted that he handled some of the glassware, helped set it up, and knew it was a methamphetamine lab.[15] J.A. 98-99. During the interview, respondent made no mention of the CIA. J.A. 100.

ARGUMENT

Congress Established A "Free Zone" In Settlement Negotiations

In 1972, the proposed Federal Rules of Evidence contained a provision on the inadmissibility of settlement discussions in a criminal case. Rule 410,[16] established a policy to encourage and protect settlement negotiations to achieve resolution through compromise, "give and take," of the majority of cases without formal time-consuming litigation.[17] The Senate Report adopted a more limited Government position that statements made in

[15] The agent who made a report of the interview made no mention of the question about fingerprints or respondent's alleged admissions about the methamphetamine lab. J.A. 101. When the agent made the statement about the respondent's fingerprints on the glass, he had no knowledge of the results of any such test. J.A. 102-3.

[16] Rule 410 is set forth in Petitioner's Brief, Appendix 1a-2a.

[17] See Notes of the Advisory Committee on 1972 Proposed Rules (West 1994 Federal Criminal Code and Rules 231): "As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively discourages it."

settlement agreements could be used for impeachment purposes,[18] as well as a prosecution for perjury, (No. 93-1277), 1974 Cong. & Admin. News 7057-7058. By contrast, the House Report would have precluded their use. The Conference Committee adopted the Senate provision allowing a prosecution for perjury but only under the most restrictive setting in which the statement is made on the record, under oath, and with counsel. It deferred implementation of this rule until the review and adoption of Federal Rule of Criminal Procedure 11 (e)(6).[19] In 1979 Congress clarified Rule 11(e)(6) and Rule 410 by limiting the application of the rule to settlement negotiations with prosecutors, thereby expressly making it inapplicable to negotiations with agents. The Note to the 1979 amendment stated "this history shows the purpose of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions" between the

[18] The Government's position before Congress was a far more limited impeachment request. As stated by Assistant Attorney General W. Vincent Rakestraw: "While we agree that conversations occurring during informal plea discussions should not be admissible in evidence, we believe that statements made by a defendant voluntarily and in open court during the course of the actual plea, with the advice of counsel, should be admissible, at least to impeach the defendant if he subsequently attempts to withdraw his plea and take the stand in his own behalf at trial. Hearing before Subcommittee on Criminal Justice of the Comm. on the Judiciary, House of Representatives (17 Sep 74) 44. [Emph. added.] See also similar comments of then U.S. Attorney for the District of Columbia. Ibid, 78. This position appears reasonable, for it insures judicial supervision and the requirement of voluntariness.

[19] This rule is set forth in Petitioner's Brief, Appendix 2a-3a.

parties.[20] The Committee noted, "Moreover, by relating the statements to 'plea discussions' rather than 'an offer to plead,' the amendment ensures 'that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility.' **United States v. Brooks**, 536 F.2d 1137 (6th Cir. 1976)." The 1979 amendment then added a second exception "to the general rule of nonadmissibility": if part of the plea discussions are properly before the court, then the remaining plea discussions may be admissible.[21]

In summary, as a general rule, settlement negotiations between the Government and the accused are inadmissible. Congress specifically rejected the use of the Senate's proposal that such settlement negotiations could be used to impeach the defendant.[22] The legislative policy is clear and unequivocal.[23] Except for two specified, narrow exceptions, settlement discussions concerning issues of facts, assessment of witnesses, anticipated legal rulings, probable outcome of the case (a fact determination made by the jury), and possible sentence, are inadmissible. Congress has made a fundamental policy determination and expressly rejected the exception for the purposes of impeachment of a defendant at the time of trial.

Prosecutorial Primacy in Federal Sentencing: the Motion to Depart for Substantial Assistance

Although Congress did not grant prosecutors the right of impeachment of defendants with their settlement statements, Congress has dramatically increased the power of prosecutors over sentencing. Prior to 1 November 1987, the effective date of the Sentencing Reform Act of 1984, federal sentencing had a system of checks and balances. The prosecutor, with the unlimited discretion to charge offenses, could set the maximum penalty for the misconduct. The prosecutor could recommend a specific sentence to the court,[24] and in 90% of the cases that recommendation was not exceeded by the judges and most often followed by them. Under pre-Guidelines law, the judge had unfettered discretion up to the statutory maximum, but had begun to use the Parole Guidelines,

[20] 1994 Federal Criminal Code and Rules (West) 48.

[21] Ibid, 49.

[22] Settlement negotiations must be fair and, equally important, be perceived as fair. If petitioner prevails in its position, the bargaining process will be turned into a process for the accumulation of devastating trial evidence. Both sides at the settlement table, armed with tape recorders, will be waiting for the other to make some tactical blunder that could be used at trial. It would difficult to call this a negotiating atmosphere. Will a defendant be able to use at trial statements made by the agents or the prosecutors during negotiations to show inconsistencies of position or weakness in the case? **Compare Bruno v. Rushen,** 721 F.2d 1193, 1195 (9th Cir. 1983) (prosecution misconduct suggests weakness in prosecution case). These are the predictable absurdities which will ensue if petitioner's position is adopted..

[23] Petitioner's arguments should be addressed to the Congress or the Rules Committee.

[24] Fed. R. Crim Proc. 11(e)(1)(B).

an advisory sentencing matrix.[25] The judge was a check on the sentencing power of the prosecutor. If the judge was arbitrary and excessive, his sentencing decision was subject to further review by the Parole Commission.[26] The judge within a short time after sentence was able to reduce it.[27] The sentence a prisoner would serve was a result of the interaction of the three agencies - prosecutor, judge, and parole authority.

The Department of Justice proffered, and Congress accepted, the limit on the discretion of judges at sentencing and the abolition of parole. Congress had the right to create a Sentencing Commission, narrow the discretion of judges at sentencing, and abolish parole.[28]

[25] Parole Guidelines are similar to Sentencing Guidelines, but not as offense specific. They also considered age at first offense, drug addiction, successful performance on probation or parole, and confinement-free history. USPC Salient Factor Scoresheet.

[26] Generally, all prisoners were eligible to be paroled after completion of one-third of their sentence (18 U.S.C. 4205(a) [repealed]), and the judge could make the prisoner immediately eligible for parole (18 U.S.C. 4205(b)(2) [repealed]).

[27] Prior to the Guidelines, judges were granted a second-look and opportunity to reduce the sentence imposed within 120 days of the finality of the sentence and conviction (Fed. R. Crim. P. 35(b) [repealed]). Now a reduction is permitted only if made on the motion of the Government to reflect "defendant's subsequent, substantial assistance in the investigation of another person." Fed. R. Crim. P. 35(b).

[28] Although parole was abolished, Congress created its functional equivalent named supervised release, which was added to the sentence. If a violation occurs, the defendant answers to the court rather than a parole authority. 18 U.S.C. 3583, 3624(e). Fed. R. Crim. P. 32.1.

Mistretta v. United States, 488 U.S. 361 (1989). Although Congress permitted the Sentencing Commission to consider the defendant's age, education, mental and emotional condition, physical condition, previous employment record, family ties and responsibilities, and community ties,[29] the Sentencing Commission chose to exclude these factors as irrelevant at sentencing.[30] The criteria relevant to federal sentencing today are the nature of the offense (which may be calculated from the amount of contraband, i.e., **Chapman v. United States**, 500 U.S. ___, 111 S.Ct. 1919 (1991), or money involved) and criminal history.[31] The elimination of parole and the substantial curtailment of judicial discretion shifted the sentencing power to the prosecutor, who still retains control of sentencing by the charge filed or the charge to which the defendant will plead guilty.[32] Under the new

[29] 28 U.S.C. 994(d). Prior to the Guidelines, these were the usual factors set forth in the probation officer's presentence report to provide a comprehensive view of the offender, as well as the offense.

[30] These factors are now ordinarily irrelevant at sentencing. Chapter 5H - Specific Offender Characteristics, USSG Manual. Also race, sex, national origin, creed, religion, and socio-economic status are not relevant. §5H1.10. No consideration at sentencing is available for those who of necessity must sleep under the bridges. Also, military, civic, charitable, or public service, employment-related contributions, and similar prior good works are not ordinarily relevant. § 5H1.11.

[31] The Sentencing Commission also lists role in the offense (§ 5H1.7) and dependence upon criminal activity for a livelihood (§ 5H1.9), but the former relates to the offense and the latter to criminal history.

[32] The Sentencing Guidelines do not affect the power of the prosecutor to manipulate the charge to a result he approves. A common example is where a defendant, like respondent, charged with one pound of methamphetamine faces a mandatory minimum

sentencing scheme, the prosecutor is the gatekeeper on sentence reductions below the Guidelines as well as Congressional minimum mandatory sentences. Only one transcendental factor will ameliorate these Procrustean Guidelines and mandatory sentences – Governmental "cooperation": Substantial assistance in the investigation and prosecution of another. 18 U.S.C 3553, U.S.S.G. § 5K1.1, and Fed. R. Crim. P. 35(b).

A competent federal defense lawyer must seek out all options, explore avenues of disposition other than trial, and persuade the prosecutor to make the requisite motion, without which the cooperation is meaningless because the court will not be able to consider it. **Wade v. United States**, 112 S.Ct. 1840 (1992). Given the nature of federal sentencing, defense counsel are forced to seize upon the opportunity for cooperation, even if the client protests his or her innocence. **North Carolina v. Alford**, 400 U.S. 25, 37 (1970). If the lawyer is to serve the best interest of the client, discussion with the prosecutor about sentence is obligatory if there is any chance the defendant will be convicted. The prosecutor knows that the only "break" in mandatory minimum is in "cooperation" and has absolute control over the award of any sentencing departure. The prosecutor knows the defendant and defense counsel must come to him to discuss the case.

Plea Negotiations in Federal Courts

sentence of ten years (21 U.S.C. 841(b)(1)(A)(viii)). With the concurrence of the prosecutor, he could plead guilty to a telephone count (use to facilitate a drug transaction) (21 U.S.C. 843(b)) with a maximum exposure of four years confinement.

Most negotiations, like this case, occur after the prosecutor has filed a complaint or returned an indictment.[33] The defendant is furnished with discovery the prosecutor is willing to part with, for under the law, the prosecutor need not turn over statements of the witness, and then only if they are substantially verbatim and adopted by the witness, until that witness has testified at trial.[34] Defense counsel must contact the prosecutor as soon as possible, for the information his client may have to offer could become stale or useless if already revealed by co-defendants. In attempting a compromise short of formal litigation, the negotiations are often completed before the filing of motions to avoid unnecessary work. Defense counsel is forced, often with only limited discovery and little or no investigation, to explore quickly the range of sentencing options; he is thus handicapped at the outset of negotiations. Prosecutors are reluctant to make a commitment until they have had an opportunity to assess the value of the proffered cooperation. Defense counsel and the prosecutor will usually discuss in advance the nature of the cooperation and the individuals about whom they seek information. It can be either specific persons by name or other participants, i.e., the supplier in this or other instances, buyers, sources, information about other laboratories, transactions wit-

[33] While many "white collar" crime cases are negotiated before charges are filed, the overwhelming majority of plea bargains take place after charges have been filed.

[34] 18 U.S.C. 3600 ("The Jencks Act", so named after **Jencks v. United States**, 353 U.S. 657 (1957) (defense entitled to statements of testifying FBI informants) , which Congress then in 1957 severely restricted to preclude defense discovery of witness' statements prior to their actual testifying); Fed. R. Crim. Proc. 12(i) and 26.2.

nessed, and even hearsay about other law violators.

Once the Government believes the proffer has value, it arranges a scheduled "debriefing" with the agents, either with or without the prosecutor. At this "debriefing" the agents go into great detail searching for every possible fact concerning the activities and identity of the persons they will investigate or prosecute. Sometimes there are follow-up sessions where the agents want clarification or seek additional information or assistance.[35] If a concern exists, the prosecutor or the agents may obtain a sworn statement (i.e., a written statement made under oath, or a deposition before a court reporter) or the prosecutor may take the cooperating defendant before the grand jury to "lock in" his or her testimony against a later change of heart.

The Government generally gives no commitment on the extent of a downward departure,[36] for the prosecutor reserves the right to not only evaluate the nature of the cooperation about others but retains the right to determine its authenticity. After the debriefing(s) and other assistance, the defendant will enter a plea usually pursuant to a written plea agreement. Left until the time of sentencing is the prosecution decision on whether the Government will make a motion for departure or provide any other favorable sentence recommendation.

[35] The agents will often ask the cooperating defendant to testify or work undercover to earn "substantial assistance" for making other cases.

[36] In this case, the agent at the interview suggested a possible sentence or sentence reduction of two years (J.A. 77) without knowing what type of information the respondent would furnish.

Under the Guidelines, the sentencing procedure is protracted, and sentencing will occur not less than eleven weeks after the plea of guilty is entered.[37] In many instances, the prosecutor reserves the right to make the motion for cooperation or substantial assistance and the amount to be credited below the Guidelines or the minimum mandatory sentence.[38] The prosecutor will have substantial time to evaluate the cooperation, and if misled, may withdraw from any commitment to making the motion for a departure for cooperation. If the prosecutor concludes the defendant was untruthful during the debriefing, there are other remedies available other than allowing the inconsistent statements to be used for impeachment when the defendant testifies at trial.[39]

[37] In the Southern District of California, which is typical of other district courts, sentencing is scheduled at least 11 weeks after the plea of guilty is entered or the verdict or finding of guilt are returned. U.S. Dist Ct. So. Dist. Calif. General Order 350, dated 16 Mar 93. See Fed. R. Evid. 201(Judicial Notice).

[38] If the prosecutor makes the motion, the court may go below the level or reduction proposed by the prosecutor. **United States v. Keene**, 933 F.2d 711 (9th Cir. 1991).

[39] **United States v. Gordon**, F.3d , 1994 WL 135383 (11th Cir. No. 93-6207 4 May 94) (defendant's lying during plea agreement exempted Government from making the motion for departure for cooperation). The Government's claim that it needs a sanction for the dishonest "cooperator" (Pet. Brief 27) is greatly overstated. Not only may the Government withdraw from any commitment to move for a reduction of sentence, but may seek an increased sentence for obstruction of justice. § 3C1.1.

Waiver of Congressional Protection of Settlement Discussions in Criminal Cases is a General Public Concern, Rather than a Private Concern, and is Invalid as Contrary to Public Policy.

Not every right may be waived. The Government should not be able to extract from a criminal defendant a waiver of the Constitutional protection against cruel and unusual punishment (Eighth Amendment) or the freedoms of speech or religion (First Amendment), which are fundamental protection of society as a whole rather than limited to the individual holder of the right. The Fourth Amendment right of privacy consists of two components: the individual's expectation of privacy and that which society deems as a reasonable expectation of privacy.[40] The individual may consent to the intrusion of his personal right of privacy, but his action could not control what society deems as reasonable, nor could the individual waive the societal standard of reasonableness so as to make an otherwise unlawful search valid. Also, the primary focus of Fourth Amendment protects the individual from Government intervention, rather than the public generally. Each Amendment, like each statute, must be evaluated on its own to determine the public and private interest protected. The public interest in freedom of religion and speech and freedom from cruel and unusual punishment is of paramount concern, for these rules define who we are as a society. Because of the paramount public interest, a waiver of these rights by an individual would be invalid.

[40] The definition now adopted by the court was formulated by Justice Harlan in his concurring opinion in **Katz v. United States**, 389 U.S. 347, 361 (1967): "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

The Government, as well as the dissenting judge below, placed great weight (Pet. Brief 8, 22, 26, 32) on **Town of Newton v. Rumery**, 480 U.S. 386 (1987),[41] in which a knowledgeable defendant in a criminal case after careful deliberation waived his potential civil rights action (42 U.S.C. 1983) in return for the dismissal of the criminal charge. The Court carefully noted this was the surrender of an uncertain civil judgment in return for a guaranteed dismissal of the criminal case. Justice O'Connor noted: "The legitimacy of plea bargaining depends in large measure upon eliminating extraneous considerations from the process. [Citations omitted.] No court would knowingly permit a prosecutor to agree to accept a defendant's plea to a lesser charge in exchange for the defendant's cash payment to the police officers who arrested him." 480 U.S. at 400-401. The waiver agreement was written by the defendant's attorney and considered by him three days before he signed it. 480 U.S. at 394. The Court noted that although this release-agreement did not take place under judicial supervision, plea bargaining generally is subject to judicial supervision which serves to insulate it from prosecutorial abuse. 480 U.S. at 400. Because the majority acknowledged the existence of frivolous civil rights complaints, there may be a public interest favoring release agreements. Justice Powell's opinion made it

[41] Justice Powell wrote the plurality opinion indicating that Congress gave the individual the right under 42 U.S.C. 1983, not the public generally. 480 U.S. at 395. Justice O'Connor wrote the decisive concurring opinion emphasizing the Government had the burden to prove "the agreement is neither involuntary nor the product of an abuse of the criminal process." 480 U.S. at 399. (Emphasis added.)

clear that the resolution affected release of a civil case, and that this was not a criminal case. 480 U.S. at 397 n. 8.

The most obvious difference between **Rumery** and this case is that Congress created an individual right in 42 U.S.C. 1983, but it established a process of settlement negotiations that governed both the Government and all defendants prohibiting the use of statements made during those discussions. The settlement rules apply to both parties, prosecution and defense, and it was primarily to protect the process from abuse that caused Congress to not permit negotiation statements from being used for impeachment.

An apt analogy is the employer-employee relationship concerning the Congressional regulation of that superior-inferior relationship. The Government, even more than the employer, has absolute control over the sentence, and deals with individual defendants one at a time, unlike the employer whose authority can be countered by collective bargaining. The Fair Labor Standards Act of 1938 imposed minimum wages for covered employees and established liquidated damages against employers for violations. In **Brooklyn Savings Bank v. O'Neil**, 324 U.S. 697 (1945), an employee was given a check for $423.16 for overtime and as a release for any claim against the employer bank for liquidated damages. The Court stated the general principle concerning the waiver of rights created by Congress:

> It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver contravenes the statutory

policy. 324 U.S. at 704.

That statute recognized the unequal power of the employer and employee (324 U.S. at 706-707), much as the Fed. R. Crim. Proc. 11(e) recognizes the power of the prosecutor in making non-binding (11(e)(1)(B)) or binding sentencing recommendations (11(e)(1)(C)).[42] The Court emphasized the unavailability of waiver:

> Neither the petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employer subject to the Act. No one can doubt but that to allow waiver of statutory wages would nullify the purposes of the Act . 327 U.S. at 707.

Substitute Government or prosecutor for employer, and settlement negotiations for statutory wages, and the public policy prohibition of waiver of the minimum wage – a protection against the abuse of the unequal bargaining positions of the parties– applies to preclude waiver of rules that further settlement discussions in criminal cases.

The power and superior bargaining position of the prosecutor leads inexorably to the extraction of other unreasonable waivers because of the defendant's compulsion to seek alleviation from the Guidelines or statutory minimums. In this case respondent apparently gave up

[42] Under Fed. R. Crim. Proc. 11(e)(1)(C) the court may reject the sentence agreed to by both parties, but then must permit the defendant to withdraw the plea of guilty. This rarely occurs. The prosecutor may also dismiss charges (11(e)(1)(A)), to which the court usually acquiesces.

his **Kastigar** rights. Thus, even if the privilege against self-incrimination was violated by coercion, the Government precluded any inquiry as to the use or derivative use of the improper statements secured. What is to preclude the prosecutor from demanding from a defendant and the defense lawyer that in order to enter into § 5K1.1 negotiations, the defendant would have to give up the right to trial by jury or any hearsay objection short of a Confrontation Clause violation.[43] The right to trial by jury may be surrendered in open court after a careful examination of the options, which would be subject to judicial scrutiny. The advantage the prosecutor has in controlling the sentence should not be permitted to defeat the policy established by Congress to foster settlement negotiations.

Benefit Without Bargaining: Post-Indictment Interrogation Under Guise of Settlement Is Error.

The nature and conduct of the pretrial interview reveals it was a post-indictment interrogation about the specific offense under the guise of a "proffer" or plea bargain for a lesser sentence. Such interrogation is in violation of the Sixth Amendment right to counsel when defense counsel does not realize that the "settlement

[43] The Government referred to the stipulations agreeing to the waiver of evidentiary rules. (Pet. Brief 17-18). In the trial of a case, there will be many motivations for entering into such stipulations by both sides that ease the trial of the case and focus on the critical issues. The settlement conference, if the Government's theory is correct, could now be used by the prosecutor to secure waivers of the rules of evidence. It is one thing to stipulate on a level playing field, it is another to be forced to surrender every fundamental right to gain the opportunity to plea bargain.

conference" is a post indictment interrogation. **Massiah v. United States**, 377 U.S. 201 (1964); **Brewer v. Williams**, 430 U.S. 387 (1977); **United States v. Henry**, 447 U.S. 264(1980); and **Maine v. Moulton**, 474 U.S. 159 (1985).[44] This Court, summarizing the Sixth Amendment prohibition, stated: "As our recent examination of this Sixth Amendment issue in **Moulton** makes clear, the primary concern of the **Massiah** line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." While the **Massiah** line of cases dealt with statements made by a defendant in absence of his attorney, the principles are applicable when the attorney is present but is unaware that an interrogation is taking place. Defense counsel and respondent did not waive the right to be free from interrogation, because they did not know the settlement session was a disguised attempt to elicit statements from the accused that could be used against him at trial.

Neither the prosecutor nor the agents sought information about "another person,"[45] but focused instead on the actions and statements of the accused. They

[44] The actions of the police were designed to deliberately elicit incriminating remarks. **Kuhlman v. Wilson**, 477 U.S. 436 (1986). Also, the inquiry was directed toward the offense with which respondent had been charged. **McNeil v. Wisconsin**, 111 S.Ct. 2204 (1991).

[45] The prosecutor stated that reason for respondent coming to their office "was to cooperate with the government and provide information about other traffickers." J.A. 61. Agent Moreland testified that Shuster, the respondent's alleged source of the methamphetamine, was arrested, turned Government informant, and agreed to act as a broker to obtain methamphetamine from the respondent on the day of his and respondent's arrest. R.T. 101-106, 157-161.

accused him of lying, a standard interrogation technique. They confronted respondent with evidence for the sole purpose of eliciting impeaching statements. J.A. 98. They used a ruse of saying his fingerprints were on the glassware to extract admissions from him about the knowledge of the laboratory. J.A. 102-103.

All prosecutors and agents know that statements taken in violation of **Miranda** warnings may be used to impeach a defendant if the defendant testifies at the time of trial. **Oregon v. Haas**, 420 U.S. 714 (1975); **Harris v. New York**, 401 U.S. 222 (1971). The police are not allowed to deliberately refrain from **Miranda** warnings with the planned expectation to use the statements for impeachment. See **Cooper v. Dupnik**, 963 F.2d 1220 (9th Cir. 1992) (en banc). In **Cooper** the police planned to arrest a rape suspect and question him without **Miranda** warnings until they obtained a confession. The officers knew that the confession or admissions would be inadmissible in the prosecutor's case in chief, but they anticipated they would be used for impeachment. The police expected the confession would prevent the defendant from testifying he was innocent or would hinder an insanity defense. 963 F.2d at 1224. The officers knew their plan violated the law. 963 F.2d at 1225. The court found that Cooper's Fifth Amendment privilege against self-incrimination was violated and that the police conduct shocked the conscience and stated a cause of action under 42 U.S.C. 1983. 963 F.2d at 1236-1237.

Public policy, the interplay of the Fifth Amendment privilege against self incrimination, the right to due process and the Sixth Amendment right to counsel preclude the prosecutor from using settlement confer-

ences as post-indictment interrogation sessions to deliberately obtain statements that will be used against the defendant if he testifies or to keep him off the witness stand.

Preclusion of Prosecution's Exploitation of the Inconsistencies Will Not Create a Defendant's "Right to Lie."

Petitioner's characterization of a "defendant's right to lie" is an exaggerated prejudgment about the nature of the inconsistencies in a statement. Many reasons other than lies could explain inconsistencies. Thus, here, the failure of respondent to tell the prosecutor and agents at the settlement interview about his belief that Shuster was a CIA operative engaged in the manufacture of explosives was exploited at trial. J.A. 63, 65. Just because respondent may testify differently than what the agents said he said at the interview is not necessarily a lie. That determination is one for a jury. It is indelible bias and prejudgment to assume every inconsistency is a lie of the defendant and the truth recounting by the agent. There is an even greater evil avoided by Congress' policy exclusion of such "evidence" – the danger that the jury would consider the existence of such "plea bargaining" by a defendant as an admission of guilt.

The Government Failed to Prove That There Was Any Waiver for Impeachment, That It Was Knowingly and Intelligently Made, or That It Was Voluntary.

The Government has the burden to show the waiver was voluntarily made. **Town of Newton v. Rumery**, 480 U.S. 386, 397-398, 399 (1987). Only respondent and the one agent to the interview testified concerning this issue. Respondent, whose testimony

was unchallenged as to his dealings with defense counsel, spent only five minutes with him before the meeting, and had only a vague understanding that the meeting was to reduce his sentence.[46] J.A. 74-75. Prior to the meeting the defense attorney even misinformed respondent that he faced a five-year minimum mandatory sentence, when for a pound of methamphetamine it was ten years.[47] Although the agent testified that the prosecutor told respondent at the start of the meeting:

> . . . if he decided to later take the stand in his defense anything that he might say at this meeting could be used to -- basically for perjury reasons. If he told us one thing at that meeting and later told us another thing and they were contradictory to each other, that that could be brought up in a trial setting.[48] J.A. 97.

The agent then testified by reciting what respondent said. J.A. 97. However, nothing in the agents' trial testimony shows that the respondent either understood these warnings or waived them. The admonishment

[46] During the meeting the respondent testified he consulted once with his attorney (J.A. 66), but the agent testified he consulted twice with his attorney (J.A. 100).

[47] 21 U.S. C. 841(b)(1)(A)(viii) (100 grams or more of methamphetamine is a ten-year minimum mandatory). The agent corrected the respondent's erroneous understanding and advised him he was facing a ten-year minimum mandatory sentence. J.A. 77.

[48] Respondent was also told that if he lied he would be charged with false statements. If he pleaded guilty, he would receive consideration for truthful testimony. He was told of some Kastigar matter of which the agent did not recall the details. J.A. 96-97.

itself by the prosecutor is not a waiver. Respondent had no recall of ground rules of the meeting, a waiver of rights, the authority of the Government to unilaterally determine whether his statements were accurate (and use them against him at trial if they determined that issue adversely) or his right not to speak.[49] J.A. 83. Because the record shows no waiver or affirmative agreement to the conditions of the meeting, this Court has no waiver to assess. Cf., **Boykin v. Alabama,** 395 U.S. 238 (1969) (courts cannot assume from a silent record that a guilty plea had been voluntarily made or that constitutional rights have been freely and intelligently waived).

A knowing and intelligent waiver of rights is fundamental to review of the question presented. Not existing, there is no basis to determine if an otherwise proper waiver of rights may be made in the context of bargain. This petition should be dismissed as having been improvidently granted.

If respondent's policy arguments fail, this Court will have to grapple with the issue of what sort of waiver will allow Government use at trial of a defendant's settlement statements. For example, respondent was not advised of his statutory rights to exclude such statements under Rule 11(e)(6). Should that not be incorporated in any "waiver?" Or that the prosecutor unilaterally determines the truthfulness of the cooperation, and may not only reject it, but use it against the defendant at trial?

Here, both the agent and respondent knew the

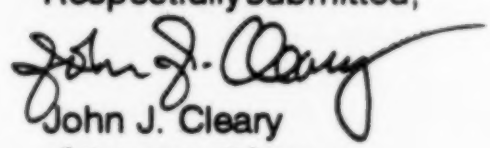
[49] Respondent admitted he was told that he had to be truthful (J.A. 64-65), but his only other understanding of "guidelines" (conditions of the interview) was the Sentencing Guidelines (J.A. 75-76).

interview was a condition precedent to a lesser sentence. J.A. 75. Respondent said that the agent "offered me two years of a reduced sentence for coming in the debriefing if he accepted my answers of what it was that I was supposed to answer of his questions." J.A. 77. He knew the prosecutor had control over the sentence that the judge did not have. J.A. 78-79. The meeting was induced by a conditional promise of leniency, which undermines the voluntariness of the statements. For an action to be "free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." **Malloy v. Hogan**, 378 U.S. 1, 7 (1964). Also, unlike an improperly **Mirandized** statement, an involuntary statement cannot be used for impeachment. **Mincey v. Arizona**, 437 U.S. 385, 398 (1978).[50]

CONCLUSION

Because there was no proof of waiver, the petition should be dismissed as improvidently granted. In the alternative, the judgment of the lower court should be affirmed.

Respectfully submitted,



DATED: 30 June 1994

John J. Cleary
Attorney at Law

[50] Use against a defendant of his involuntary statement is a denial of due process of law. Although use of an involuntary confession or statements does not call for automatic reversal (**Arizona v. Fulminante**, 499 U.S. 279 (1991)), the use of the settlement interview statements here could not be harmless beyond a reasonable doubt.